NO.

JUN 19 1990

JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1989

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX OF THE ESTATE OF WILLIE ROBINSON, JR., AND THE REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF WILLIE ROBINSON, JR.; COMMILLA PERKINS AS REPRESENTATIVE OF THE HEIRS AT LAW OF PATRICIA ANN PERKINS, DECEASED; DEBRA ANN JOHNSON, A MINOR BY AND THROUGH JOHNNIE MAE JOHNSON, HER MOTHER AND NEXT FRIEND; AND DETRICK GRANBERRY, A MINOR BY HIS FATHER AND NEXT FRIEND, ALONZO GRANDBERRY, AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF SHALANDA GRANBERRY

Petitioners

v.

MTD PRODUCTS, INC., AND HENRY M. BUMP

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1. QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Should Pre-trial Orders, pursuant to Rule 16 of the Federal Rules of Civil Procedure, be construed narrowly to preclude issues which are inherent in the language of the Order and no surprise to opposing counsel, or should they be broadly construed to include such issues for a complete adjudication?

(2) Can a Federal Highway Administration Regulation which requires a truck driver to wear a seat belt be used as the basis of a negligence per se instruction when a truck driver fails to wear the seat belt, is jarred out of his seat in an accident, and hits a car full of people on the opposite side of the road?

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ESTELLA HAYNES ROBINSON,
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OF WILLIE ROBINSON, JR., AND
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Petitioners

v.

MTD PRODUCTS, INC., AND HENRY M. BUMP
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

OPINIONS BELOW

By judgment on the 21st day of March, 1990, the United States Court of Appeals for the Fifth Circuit denied a petition for rehearing of a decision made on February 22, 1990, affirming a judgment of the United

States District Court for the Northern District of Mississippi, Delta Division, dated February 17, 1988. The opinion of the court of appeals (A-1) is reported at 894 F.2d 758 (5th Cir. 1990). The opinion of the District Court (A-23) is not reported.

JURISDICTION

The decision of the Fifth Circuit Court of Appeals was entered February 22, 1990, and a petition for rehearing was denied on the 21st day of March, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 .

STATUTORY PROVISIONS INVOLVED

The provisions are listed as follows and the text appears in the appendix:

1. Federal Rules of Civil Procedure Rule 16

2. A Federal Motor Carrier Safety Regulation promulgated by the Federal Highway Administration regarding the duty of a truck driver to wear a seat belt is found at 49 C.F.R. § 392.16 (1984).

STATEMENT OF THE CASE

Petitioners are Debra Johnson and the Wrongful Death Beneficiaries of Willie Robinson, Patricia Perkins, and Shalanda Granberry. They filed separate lawsuits alleging negligence against Henry M. Bump and his employer, MTD Products, Inc., as a result of an accident in which, after an initial collision, Mr. Bump's eighteen-wheel tractor trailer rig crossed the center line and collided with Willie Robinson's car. Federal Jurisdiction was based upon diversity of citizenship. The cases were consolidated for trial.

The evidence at trial showed that this accident was a multi-vehicle accident, which occurred on a two-lane U.S. highway known as Highway 61. A northbound eighteen-wheeler driven by Henry M. Bump was struck by a southbound car driven by a Willis Harris. There was evidence to the effect that Mr. Bump was knocked from his seat, not wearing a seat

belt, and was no longer able to control his truck, which went into the southbound lane of travel, striking the Robinson car, killing three people and causing permanent brain damage to Debra Johnson. Soon after the accident, Mr. Bump told the trooper investigating the accident that he was thrown out of position in the first collision. (Trial Transcript p. 468) Indeed, the evidence proved that 2.4 seconds passed between the Harris collision and the Robinson collision with no braking by Mr. Bump. (T. 1523) However, at trial, Mr. Bump denied being thrown from his seat in the collision with the Harris car. (T. 327) Petitioners contend that if the seat belt had been worn, Mr. Bump would not have lost control of the truck.

The trial court in a preliminary ruling decided that Mr. Bump's failure to wear a seat belt as required by federal regulation would not be the subject of a negligence per se instruction because the seat belt regulation

was not designed to protect other users of the highway but only the driver. The trial court stated another reason for this preliminary ruling was that the issue was not set forth in the contested issues of law in the Pre-trial Order; although the issue was set forth in the concise summary of ultimate facts. (A-29)

At the instruction conference prior to the jury charge, the trial court gave a ruling on the record for his refusal of a negligence per se instruction regarding the failure to use a seat belt and stated specifically that the seat belt law was not designed to protect other users of the highway but only the driver. This ruling at the instruction conference contained no mention of any problems concerning the Pre-trial Order. (A-40)

The Fifth Circuit Court of Appeals affirmed the trial court's decision not to grant a negligence per se instruction based on

the seat belt regulation and grounded the affirmance on a restrictive reading of the Pre-trial Order. The Court ruled that trial judges should be encouraged to interpret Pre-trial Orders narrowly under Rule 16 of the Federal Rules of Civil Procedure. (A-8) Although, the Pre-trial Order contained a "Concise Statement of Facts" portion which set forth that Mr. Bump was not wearing a seat belt and could have been thrown from his seat in the collision with the Harris car and a stipulation that Mr. Bump did not wear his seat belt, the Fifth Circuit Court of Appeals decided that trial judges should be encouraged to interpret Pre-trial Orders narrowly rather than broadly. The court of appeals did not discuss whether the seat belt regulation was designed to protect other users of the highway. The regulatory history was extremely clear that the regulation <u>was designed</u> to protect other users, and petitioners received no serious challenge from the respondents on

this issue at the appellate level. Also, the court of appeals did not discuss the admission of defense counsel that the issue was no surprise. (A-43)

REASONS FOR GRANTING CERTIORARI

I.

THE MAJORITY OF THE CIRCUITS AND THE COMMENTATORS SUPPORT A BROAD CONSTRUCTION OF PRETRIAL ORDERS

This case involves a serious misinterpretation of the Federal Rules of Civil Procedure by the Fifth Circuit Court of Appeals, which is in direct conflict with those in the First, Six, and Tenth Circuit Courts of Appeals. The Fifth Circuit holds that Rule 16 requires that Pre-trial Orders should be narrowly construed, where the other circuits have held that the Pre-trial Order should be broadly and liberally construed in order that all of the issues inherent in the language of the Pre-trial Order can be adjudicated. Petitioners urge this Court to settle this conflict between the Circuits and

to decide that Pre-trial Orders pursuant to Rule 16 should be interpreted broadly. This position is supported by the majority of the Circuits and by both Professors Moore and Wright.

In addition, the interpretation of the seat belt regulation is an issue of national significance and of importance to millions of drivers and passengers on the United States highways. The history of the Federal Motor Carrier Safety Regulation which requires truck drivers to wear their seat belts explicitly and clearly demonstrates that this regulation was designed to protect other users of the highway and to enhance the truck driver's ability to control his vehicle in crash situations. A decision on this issue could reduce the deaths and injuries on the highways under circumstances similar to those in this case.

The pre-trial conference took place February 4, 1986, two years prior to trial.

Petitioners in the Plaintiffs' "Concise Summary Of Ultimate Facts" part of the Pre-trial Order set out in detail that Mr. Bump may have been thrown from the seat in the Harris collision because of his failure to wear a seat belt:

> Mr. Bump failed to slow or stop the truck safely. The only skid marks of the truck North of the place where the collision with the Harris automobile occurred are front wheel tractor brakes. Mr. Bump should have been able to apply his brakes and stop before the collision with the Robinson automobile, but was unable to do so. It appears that he either did not fully apply the brakes, fearing a jack-knife, or not wearing seat belts, was thrown out of position in the collision with the Harris automobile. (Emphasis added.)
>
> ....
>
> Mr. Bump was not wearing seat belts and hit his head on the roof, cutting it so that forty stitches were required, in one of the collisions. (A-45)

The Pre-trial Order in "Facts Established By Stipulation Or Admission" states:

Mr. Bump was not wearing seat belts.*

*Relevancy and admissibility are not admitted by MTD or Bump. MTD and Bump reserve the right to explain stipulation number 49 to the jury. Objection is made on the basis of Rule 403.

(R.375)

The only issue that the parties viewed as "contested" and "of law" was independent intervening cause referred in the Section of the Pre-trial Order on "Contested Issues Of Law." The Pre-trial Order did not set out any statutes of the State of Mississippi, such as statutes regarding operating at 55 miles per hour and remaining on the right hand side of the road. Petitioners treated the seat belt regulation in the same manner. (A-52)

The seat belt issue was no surprise to the respondents (defendants). The Defendants, Bump and MTD, addressed the seat belt issue in a Motion in Limine filed with the Court seven (7) days prior to the February 1st, 1988 trial. The Motion, which surprisingly narrows even further this particular issue, raises

several seat belt issues, including their position that the failure to wear seat belts is not evidence of negligence.

(A-53)

The trial court's initial ruling on the seat belt issue was as follows:

> In the Court's opinion, this CFR concerning seat belts was enacted for the purpose of protecting the wearer of the seat belt, the driver of the vehicle. It is the Court's opinion that the evidence that the Defendant Bump's truck was equipped with a seat belt assembly and that it was not being worn or utilized on the occasion complained of should come in just as the evidence came in in the Hinson case that the driver of the car was parked on the wrong side of the street. In no event should this evidence form the basis of a negligence per se instruction and in no event should the provisions of the Code of Federal Regulation provision come before this jury. The Court is of this opinion, number one, in that the Pre-trial Order in this case does not under the Section entitled "Questions of Law," the Code of Federal Regulation provision is not mentioned, the seat belt is not mentioned, the issue was not preserved. It's not preserved anywhere in the Pre-trial Order in any mixed question of law and fact. In fact, the CFR provision is not mentioned in the Pre-trial Order. The Court is of the opinion that you cannot interject questions of law at

> this late stage in this proceeding. Number two, the plaintiff has not shown that the plaintiffs in the case sub judice are members of any protected class envisioned by the enactment of the regulation and that the resulting harm is of the type sought to be prevented by passage of the regulation.

(A-29)

At the instruction conference, the trial judge made no mention of any problem concerning the Pre-trial Order and only stated that the regulation was designed only to protect the truck driver:

> Pursuant to the pronouncement of the Mississippi Supreme Court in Haver v. Hinson, 385 So. 2d, page 605, Mississippi, 1980, wherein the Court held that the violation of a safety regulation or statute constitutes negligence per se only where the plaintiff is a member of the class sought to be protected by the statute and the resulting harm is the type sought to be prevented by the passage of the statute or regulation would the failure to utilize this equipment constitute negligence per se. Therefore, the Court is not and will not give a negligence per se instruction on the issue of Mr. Bump's failure to wear a seat belt.

(A-40)

In the case at bar, the court of appeals supports its narrow interpretation of the Pre-trial Order with a prior Fifth Circuit decision, Flannery vs. Carroll, 676 F. 2d 126, 129 (5th Cir. 1982). The Court in the Flannery case stated as follows:

> District Courts are encouraged to construe Pre-trial Orders narrowly, without fear of reversal. Hodges, 597 F.2d at 1014.

Flannery vs. Carroll, 676 F.2d 126 (5th Cir. 1982).

The Fifth Circuit has adopted the narrow construction rule and has taken it to a new extreme in the case at bar. This construction of Rule 16 of the Federal Rules of Civil Procedure is in direct conflict with the entire spirit of the Rules of Civil Procedure. The majority of the other Circuits have ruled that Pre-trial Orders should be liberally and broadly construed to include all issues which

are inherent in the language of the Pre-trial Order. The Fifth Circuit has not followed the other Circuits.

Rule 16 reads in pertinent part as follows:

> .... (c) **Subjects to be discussed at Pre-trial conferences.** The participants at any conference under this rule may consider and take action with respect to (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
>
> .... (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents,and advance rulings from the court on the admissibility of evidence;
>
> (8) the form and substance of the pretrial order;
>
> ....(e) **Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Fed. R. Civ. P. 16.

In the case of Hodges vs. United States, 597 F.2d 1014 (5th Cir. 1979), the Fifth Circuit discussed Rule 16:

> Rule 16, Fed.R.Civ.P., establishes a mechanism whereby the trial court can expedite the just disposition of cases and reduce the costs of litigation. This mechanism consists of a pretrial conference and a resulting order. The pretrial conference is designed to restrict the scope of the trial by defining and therefore limiting the issues involved.

Id at 1017.

Each case of the Fifth Circuit seems to push further and further into requirement of a narrow construction. Professor Moore in his treatise has noted the split in the Circuits on this issue:

> When interpretation of a pretrial order is necessary, the court should not follow an inflexible approach; pretrial orders should be liberally construed. There is, however, contrary authority.

3 J. Moore, Moore's Federal Practice ¶16.19 pp. 16-77, through 16-78 (2d ed. 1989).

Professor Moore cites the Flannery v. Carroll-case as the example of contrary authority. Other Circuits such as the Tenth Circuit do not adhere to this rule. In the case of Century Refining Company v. Hall, 316 F.2d 15 (10th Cir. 1963), the Tenth Circuit described the Pre-trial Order as a tool to facilitate a trial on the merits which should be construed liberally:

> But, while the Pre-trial Order should measure the dimensions of a lawsuit and govern its course in the absence of some good reason for departure, this does not mean that the order should not be liberally construed to embrace all of the legal and factual theories inherent in the issues defined therein. Any other construction of the Pre-trial Order would tend to unduly constrict the trial of the case and defeat the central and salutary purpose of the Federal Rules of Civil Procedure to insure the trial of every lawsuit on its merits. It is a procedural tool to facilitate the trial of a lawsuit on its merits and not to

> defeat it on a technicality. We must not allow ourselves to construe the Pre-trial Order in the spirit of a common law pleading.

Id. at 19-20.

Professor Wright in his treatise on Federal Civil Procedure concurs in the interpretation of Rule 16 set forth in the Hall case:

> In addition to allowing matter to be introduced that is outside the Pre-trial Order in appropriate cases, courts have held that the order should be construed liberally so that it covers any of the possible legal or factual theories that might be embraced by its language. Even if the pre-trial order cannot be interpreted to apply to the issue that is challenged as being outside its terms, relief still may be available because Rule 16 explicitly provides that the order may be modified to "prevent manifest injustice."

6. C. Wright and A. Miller, Federal Practice and Procedure, §1527, pp. 609-610 (1977).

In the case of Trujillo v. Uniroyal Corp., 608 F. 2d 815 (10th Cir. 1979), the Tenth Circuit again reaffirmed its committment to broadly construing Pre-trial Orders:

> Proper pretrial orders are indeed powerful, but even at their best they should be "liberally construed

> to cover any of the legal or factual theories that might be embraced by their language." Rodrigues v. Ripley Industries, Inc., 507 F.2d 782, 787 (1st Cir. 1974). This court has warned that the pretrial order "is a procedural tool to facilitate the trial of a lawsuit on its merits and not to defeat it on a technicality. We must now allow ourselves to construe the pretrial order in the spirit of a common law pleading." Century Refining Co. v. Hall, 316 F.2d 15, 20 (10th Cir. 1963). The reasons for avoiding overly technical applications of pretrial orders are amplified when, as in this case, the pretrial order is not properly drawn, is not definitive, specific, complete or detailed.

Trujillo v. Uniroyal Corp. 608 F. 2d 815, 818 (10th Cir. 1979).

The Trujillo v. Uniroyal Corp. case is similar to the case at bar. In the Trujillo case the judge refused a specific instruction concerning failure to warn. The case involved the explosion of a tire which was being mounted on a rim. The accident caused serious personal injury. The Pre-trial Order in general terms set out a products liability

claim. At the trial of the case the trial judge refused to give a failure to warn instruction concerning the product.

The case is similar to the one at bar because it was generally alleged by the Petitioners in the Pre-trial Order that Mr. Bump lost control of his vehicle and further they alleged that he may have been thrown from his seat because of his failure to wear seat belts. Futhermore, the Respondents admitted that the issue of seat belts and the failure to wear them was in no way a surprise to them. At a conference with the trial judge during the trial counsel for the respondents admitted on the record the issue was not a surprise:

> THE COURT: Well, we know he's going to testify that he has the fuzz-buster, the seat belts--
>
> ....
>
> MR. DUNBAR: It's a matter for argument, Your Honor, as well as the fact -- correct me if I'm wrong -- I don't think these are issues in the pretrial order.

MR. THOMPSON: Well, it's certainly no surprise to anybody.

MR. DUNBAR: No.
(A-43)

In point of fact, the respondents filed a Motion in Limine stating that there was no obligation to wear seat belts. (A-53) The Trujillo case stands for the proposition that the Pre-trial Order should not be construed in a hyper-technical fashion so as to exclude serious issues which are raised by the language of the Pre-trial Order.

The First Circuit court of appeals adopted the rule to liberally construe pre-trial orders in the case of Rodrigues v. Ripley Industries, Inc., 507 F.2d 782, at 787 (1st Cir. 1974). The First Circuit again reiterated its support of this position in the case of Geremia v. First National Bank of Boston, 653 F.2d 1, at 5 (1st Cir. 1981). The Fourth Circuit adopted the rule of liberal construction of pretrial orders under Rule 16

in the case of Howard v. Kerr Glass Manufacturing Co., 699 F.2d 330, at 333 (6th Cir. 1983). The better rule is that followed by a majority of the circuits and supported by the treatise writers.

II.

THE SEAT BELT REGULATION WAS DESIGNED TO PROTECT OTHER USERS OF THE HIGHWAYS

There can be no doubt that the seat belt regulation was designed to protect other users of the highway as well as the driver of a truck. The history of the regulation is extremely clear and explicit on this point. The Respondents have presented no history or case law that in any way contradicts this point.

The regulation of the Federal Highway Administration regarding the duty of truck drivers to wear seat belts reads as follows:

> A motor vehicle which has a seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself with the seat belt assembly.

49 C.F.R. Section No. 392.16 (1984)

The regulatory history in regard to the seat belt law is strikingly plain in its provision that the rule is to protect other users of the highway as well as the driver. In the Notice of Proposed Rule Making, F.C. Turner, the Federal Highway Administrator stated:

> Insuring that the driver will remain in his seat during evasive manuevers and crash situations should decrease the possibility of injury to passengers in commercial vehicles **and to other users of the highways.** (Emphasis added)

34 Fed. Reg. 9999 (1969)

Once again in the Preamble to the issuance of the regulation the design of the law is repeated:

> Intensive research during recent years has **conclusively demonstrated** that the proper use of occupant restraints in motor vehicles produces a marked increase in the safety of occupants **and other highway users.**

> ....Seat belt use by commercial drivers also **promises to improve the driver's control of his vehicle in emergency situations.** These conclusions justify the cost of compliance with the new requirements.
>
> (Emphasis added)

35 Fed. Reg. 10859 (1970).

The regulation is plainly for the benefit of the general driving public as well as for the truck driver. All of the petitioners qualify as members of the general driving public who were enjoying the use of the United States Highway 61 at the time of this devastating accident. The interpretation of this regulation is of extreme national significance. The lives of numerous highway users will be affected.

The Mississippi Supreme Court has ruled that these federal regulations of truck drivers furnish the reasonable man standard and are the proper subject of a negligence per se instruction. In the case of Stong v. Freeman Truck Line, Inc., 456 So.2d 698 (Miss.

1984), the Mississippi Supreme Court interpreted the relation of federal highway safety regulations to Mississippi negligence law:

> The same may be said of the federal regulations. Freeman Truck Lines is a certificated common carrier subject to federal regulation. The Federal Highway Administration and its predecessor in authority, acting well within the scope of the authority vested in them by the Congress, have promulgated a series of highway safety regulations, among which are 49 C.F.R. Section 392.21-392.22. By their terms these regulations apply to this case. They, too, furnish standards of care by which Long's conduct must be judged. See Restatement (Second) of Torts Section 286 (1965) (reasonable man standard may be defined by administrative regulations); Brandes v. Burbank, 613 F.2d 658, 664-65 (7th Cir. 1980) (reasonable man standard defined by reference to federal highway safety regulations); NeSmith v. Bowden, 17 Wash. App. 602, 607-608, 563 P.2d 1322, 1325-1326 (1977) (same).

Stong v. Freeman Truck Line, Inc., 456 So.2d 698, 707 (Miss. 1984).

The Mississippi Supreme Court held in the Stong case that the federal regulations should form the basis of a negligence per se instruction:

> First, in at least two substantive instructions, Nos. 11 and 13, the jury was advised that acts or omissions violative of applicable highway safety standards derived from state statute or federal regulations were merely evidence of negligence and not negligence per se. This was error.

Id. at 704.

In the case at bar, there is no dispute that the Respondent, Mr. Bump, violated the regulation. The only issue would be whether the violation was the proximate cause of the accident. The jury was never able to decide this issue because they were not instructed on Mr. Bump's duty to wear a seat belt.

The opinion of the Court of Appeals does not state whether or not the seat belt law was designed to protect other users of the highway. It could be implied by the absence

of comment that the Court does not believe it was designed to protect other users of the highway. Petitioners respectfully urge that such an implication would be a serious misinterpretation of this law. The regulatory history is extremely straight forward that the rule is intended to include other users of the road. A truck driver who is buckled up will not be thrown from his seat even if the truck is involved in a crash situation. These extremely large and heavy vehicles have been determined to require special regulations. A ruling which accepts other users of the highway as members of the protected class would save lives. It would also provide a meaningful penalty for non-compliance.

CONCLUSION

Petitioners submit the Court should settle the split in the circuits concerning the proper construction Pre-trial Orders pursuant to Rule 16 of the Federal Rules of Civil Procedure. The better rule is that of

the majority of the circuits which requires a broad and liberal construction of Pre-trial Orders to include all issues inherent in the language of the order. This construction is supported by both Professors Moore and Wright. This interpretation is consistent with the spirit and philosophy of the Federal Rules of Civil Procedure. Further, the petitioners urge the court to find that the administrative regulation regarding truck drivers' duty to wear seat belts was designed to protect other users of the highway as well as the truck driver himself. The regulatory history concerning this rule is clear. Such a ruling could save lives in situations similar to the case at bar. The Mississippi Supreme Court's decisions make it clear that if petitioners are a member of the protected class, then the regulation is a proper subject for a negligence per se instruction. This Court should grant certiorari to settle this important split in the circuits. This issue

affects all litigants. Moreover, the interpretation of the seat belt regulation is an issue of national significance.

Respectfully submitted,
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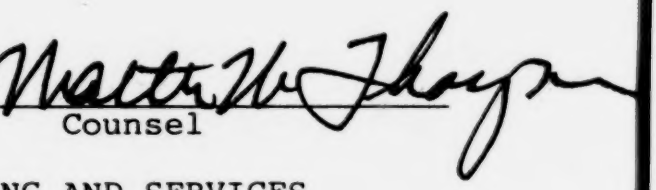
By 
Counsel

PROOF OF FILING AND SERVICES

I, Walter W. Thompson, counsel for Petitioners and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the _____ day of June, 1990, I filed the foregoing petition for writ of certiorari with the Clerk of the Supreme Court of the United States by mailing forty copies of same together with the filing fee in a duly addressed envelope by first class mail with postage thereon prepaid addressed to: Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, 1 First Street, Northeast,

Washington, D.C. 20543; and I also served a true copy of the foregoing petition on the Respondents by mailing three copies of same in respective duly addressed envelopes by first class mail with postage thereon prepaid to the following counsel of record:

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_____
Counsel for Petitioners

STATE OF LOUISIANA
PARISH OF _____, TO-WIT:

The foregoing proof of filing and services was subscribed ans sworn to before me

by Walter W. Thompson, this the _____ day of June, 1990.

My Commission expires:

_____

_____
Notary Public

APPENDIX

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1. Federal Rules of Civil Procedure Rule 16 A-55

2. Federal Highway Administration Regulation Dealing with the Duty of Truck Drivers to Wear Seat Belts at 34 C.F.R. §392.16 (1984) A-56

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Estella Hayes ROBINSON,
Administratrix of the Estate
of Willie Robinson, Jr., et al.,
Plaintiffs-Appellants,

v.

Henry M. BUMP, et al.,
Defendants-Appellees.

Alonzo GRANDBERRY, et al.,
Plaintiffs-Appellants,

v.

Henry M. BUMP, et al.,
Defendants-Appellees

Commilla PERKINS, etc.,
Plaintiff-Appellant,

v.

MTD PRODUCTS, INC., et al.,
Defendants-Appellees.

Debra Ann JOHNSON,
Plaintiff-Appellant,

v.

MTD Products, INC., et al.,
Defendants-Appellees.

No. 88-4377.

United States Court of Appeals,
Fifth Circuit.

Feb. 22, 1990
Rehearing and Rehearing En Banc
Denied March 21, 1990

Appeal from the United States District Court
for the Northern District of Mississippi

Argued: November 8, 1989 Decided: February 22, 1990

Before LIVELY,[1] JOLLY AND DUHE', Circuit Judges.

Walter W. Thompson, J. Walker Sims, Clarksdale, Miss., A. T. Tucker, Jr., Tunica, Miss., for plaintiffs-appellants.

Lucius Edwards, Hernando, Miss., for Grandberry.

Johnnie E. Walls, Jr., Greenville, Miss., for Perkins & Johnson.

Jack F. Dunbar, Holcomb, Dunbar, Connell, Chaffin & Willard, Oxford, Miss., Cynthia I. Mitchell, W. Kurt Henke, L. Elizabeth Bufkin, Holcomb, Dunbar, Connell, Chaffin & Willard, Clarksdale, Miss., for MTD Products & Henry Bump.

Robertshaw, Terney & Noble, Philip B. Terney, Greenville, Miss., for Willis Harris.

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[1]Circuit Judge of the Sixth Circuit, sitting by designation.

This is a diversity negligence action brought by the estate and family of Willie Robinson against Willis Harris, MTD Products, and Henry Bump. The Robinsons appeal from a judgment denying relief against MTD and Bump. We affirm.

MTD Products employed Henry Bump to operate an eighteen-wheel tractor-trailer rig. On November 2, 1984, Bump was driving the rig over a bridge in the northbound lane of a two-lane portion of U. S. Highway 61 followed by a small white car and a car driver by Paul Battle, III. North of the rig three cars were closely approaching in the opposing lane and the white car took this opportunity to pass the rig. In response to the action of the white car Dewey Dickins, the driver of the first car in the opposing lane, applied his brakes and permitted the white car to complete its passing maneuver and reenter the northbound lane. Collision was then imminent

between the Dickens car and the car immediately behind it driven by Willis Harris. After applying his brakes Harris lost control of his vehicle, struck the right side of the bridge, and was deflected into the oncoming tractor-trailer in the northbound lane.

Bump testified that when he saw the white car attempting to pass him he applied his brakes and began to skid. He held his foot on the brake until the white car edged into the lane in front of him. He then observed the Harris car strike the bridge rail and come across the center line and strike the left front of his rig. He testified that on impact he was thrown about the cab and did not brake at any time after the collision. He noticed that the impact with the Harris car had affected the streering and that the rig was veering to the left.

Willie Robinson's car was following behind the Harris car. The MTD rig entered the soutbound lane, struck the Robinson car, and dragged it back approximately 185 feet. Robinson and three family members were killed; two other family members were injured. The white car that began the chain of events was never identified.

The jury found that Harris' negligence caused the accident but that Bump was not negligent. The judge entered judgment against Harris and in favor of the estate of Robinson and his family, but denied relief against Bump and MTD.

[1] The parties stipulated that the MTD truck was equipped with seat belts and that Bump was not wearing a seat belt at the time of the accident. A regulation of the Department of Transportation forbids a driver of a truck such as the MTD truck from driving unless he has "properly restrained himself

with the seat belt assembly." 49C.F.R. §392.16 (1988). The appellants submitted two proposed instructions which stated that Bump's failure to use his seat belt constituted negligence as a matter of law and that, if the jury found this failure caused the accident, they were bound to return a verdict against Bump and MTD. The district judge declined to give either instruction because the issue had not been included in the Pretrial Order and because the regulation was solely for the protection of the driver.

The appellants argue that the regulation was intended for the safety of the general public and the district judge erred in refusing the instruction. The appellants also argue that the district court's ruling was based on the substance of the regulation and not appellant's failure to include the issue in the Pretrial Order. The record shows that during the presentation of the plaintiff's

case the judge ruled that the seat belt evidence should not form the basis of a negligence per se instruction:

> The Court is of this opinion, number one, in that the pretrial order in this case does not under the section entitled "Questions of Law," the Code of Federal Regulation provision is not mentioned, the seat belt is not mentioned, the issue was not preserved. It's not preserved anywhere in the pretrial order in any mixed question of law and fact. In fact, the CFR provision is not mentioned in the pretrial order. The Court is of the opinion that you cannot interject questions of law at this late stage in the proceedings.
>
> Number two, the plaintiff has not shown that the plaintiffs in the case sub judice are members of any protected class encisioned by the enactment of the regulation and that the resulting harm is of the type sought to be prevented by passage of the regulation.

When the judge later took up the matter at the charge conference he first noted he had "heretofore ruled on that." He then proceeded

to address only the substance of the proposed instruction and did not again comment on the appellants' failure to incude the issue in the Pretrial Order.

We cannot agree with the appellants that the judge's prior ruling was only preliminary and that the judge somehow implicitly reconsidered his grounds for the ruling. Nothing in the record indicates that the judge reconsidered his ruling. Nor can we agree that the agreed fact in the Pretrial Order that Bump was not wearing a seat belt sufficed to raise the issue of negligence per se when there was no mention of it in the list of contested issues. This Court has declined to force trial judges into overbroad interpretation of pretrial orders because "[s]uch a practice would be inconsistent with the underlying purpose of the pretrial procedure to define and limit the issue for trial." Hodges v. United States, 597 F.2d

1014, 1017 (5th Cir.1979). Accordingly, this Court has encouraged trial courts to construe pretrial orders to limit the issues actually tried. Swift v. State Farm Mut. Automobile Ins. Co., 796 F.2d 120, 123 (5th Cir.1986). "If a claim or issue is omitted from the order, it is waived." Flannery v. Carroll, 676 F.2d 126, 129 (5th Cir.1982).[2]

[2-6] During examination by Harris' attorney Bump was asked whether he made a "conscious decision" not to apply his brakes after the collision with the Harris vehicle.

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[2]At oral argument appellants; counsel noted that the district judge's ruling on the seat belt instruction prevented counsel from arguing to the jury the relevancy of the seat belt evidence to the issue of Bump's negligence. Although the appellant did not assign this point as error, we note for the sake of completeness that counsel was not prohibited from arguing the seat belt evidence entirely. The district judge ruled that the evidence was relevant to the issue of Bump's control of the vehicle. The judge also ruled that while counsel would not be permitted to argue that a breach of duty to wear a seat belt caused the accident, counsel would be permitted to argue the evidence to underscore that Bump had earlier confessed to being thrown clear of the driver's seat.

Bump answered, "In my mind, all I could think about was straightening that truck up to keep from having a wreck again." When asked whether there was any reason why he could not have braked, he answered "no, no." The appellants argue that Bump admitted he made a conscious decision not to brake and that the district judge erred in refusing to grant motions for directed verdict and JNOV on the basis of this admission. The appellants also argue that the district judge erred in refusing to give an instruction that required the jury to find negligence if they found Bump failed to brake properly. Rulings on motions for directed verdict and for judgment notwithstanding the verdict are reviewed under the abuse of discretion standard. Ellis v. Chevron U.S.A., Inc., 650 F.2d 94, 96-97 (5th Cir.1981). This Court considers the entirety of the evidence, and there must be substantial evidence opposed to the motions in order for

the case to be submitted to the jury. Boeing Company v. Shipman, 411 F.2d 365, 374 (5th Cir.1969) (en banc). See also Melear v. Spears, 862 F.2d 1177, 1182 (5th Cir.1989). In addition, a trial court has substantial latitude in fashioning jury instructions and the charge will be deemed adequate if, considering the totality of the charge, the instructions are comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury. Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345, 350 (5th Cir.1989). If an objection is raised against the failure to grant a requested instruction, the correctness of the proposed instruction must be shown as a threshold matter. Pierce v. Ramsey Winch Co., 753 F.2d 416, 425 (5th Cir.1985).

None of the cases cited by the appellants indicate that Mississippi courts give such weight to a failure to use brakes as to support a directed verdict or JNOV on that basis alone. See Moore v. Taggart, 233 Miss. 389, 102 So.2d 333 (1958); Nielson v. Miller, 259 So.2d 702 (Miss.1972). In Moore the Mississippi Supreme Court commented that due care requires an operator to use his emergency brake, "if need be", to avoid an accident. Moore, 102 So.2d at 338. Accordingly, the court held that a sudden emergency instruction which might have excused the defendant's "failure to use brakes" improperly assumed that both the foot brake and the emergency brake were defective, when the evidence suggested only that the foot brake was defective. Id. The court in Nielson similarly disapproved of a sudden emergency instruction in circumstances where the defendant did not explain why she did not use

her emergency brake. Nielson, 259 So.2d at 704-05. It is apparent that both of these cases deal with the propriety of a sudden emergency instruction; neither case requires a finding of negligence based solely on a failure to brake.

[7] Moreover, the record contains substantial evidence opposed to the appellants' motions for directed verdict and JNOV. Bump did not testify that he made a conscious decision" not to apply his brakes, but rather that he attempted to steer the truck in such a way as to avoid a second collision. He similarly testified that following the collision with the Harris vehicle his truck was veering to the left, that the steering would not turn back in the other direction, and that had he applied his brakes the truck might have jackknifed effectively blocking both lanes. It is clear the evidence presented a question of

negligence for the jury to resolve, and the fact that Bump did not brake following the collision with the Harris vehicle was not alone sufficient to take the matter from the jury.

Nor can we agree that the appellants were entitled to their proposed instruction on failure to brake. The Moore and Nielson cases discussed above do not give conclusive weight to failure to brake, and the appellants have brought no Mississippi case to the attention of this Court supporting an instruction which mandates a finding of negligence under these circumstances. The district judge was therefore correct in refusing the instruction.

[8] Battle, driver of the car following Bump, was called to testify for Bump and MTD. He testified that Bump was "in total control" of the truck until it was struck by the Harris vehicle.[3] The appellants argue that this

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[3]Battle answered affirmatively when asked by the district judge, "do you mean that he was

testimony constituted either a legal conclusion or an opinion on an ultimate issue. We review for abuse of discretion. Scheib v. Williams-McWilliams Co., 628 F.2d 509, 511 (5th Cir.1980).

Rule 701 of the Federal Rules of Evidence permits a non-expert to testify in the form of an inference providing the inference is "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony of the determination of a fact in issue". Under Rule 704 testimony in the form of an inference is "not objectionable because it embraces an ultimate

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driving in a safe and prudent manner and at a safe rate of speed in the proper lane of travel?" Battle also described the left front wheel of the truck following the collosion and speculated that the condition of the wheel explained Bump's inability to steer. The appellants complain of this testimony on appeal, but because no timely objection was raised before the trial judge we do not pass on these points. Fed.R.Ev. 103(a)(1).

issue to be decided by the trier of fact." Three factors determine the admissibility of lay opinion testimony under Rule 701.

> First, the witness must have "personal knowledge of the facts from which the ...opinion is said to derive." Second, a "rational connection" must exist between the opinion and the facts upon which it is based.... Finally, "the opinion ...must be helpful, either in understanding the testimony or in determining a fact in issue."

Soden v. Freightliner Corp., 714 F.2d 498, 511 (5th Cir.1983)_ (quoting Lubbock Feed Lots, Inc. v. Iowa Beef Processors, 630 F.2d 250, 263 (5th Cir.1980)).

While it is doubtful Battle was reciting anything more than his observations, the testimony was clearly admissible as an inference of a lay witness. Battle had every opportunity to observe the truck's movement, the movement of a truck is rationally connected to the control of its driver, and

the testimony was helpful in allowing the jury to assess Bump's negligence. We find no abuse of discretion in allowing the testimony.

[9] The appellants were denied an instruction which placed the burden of proof on Bump to show that he traveled onto the opposing lane of traffic through no negligence of his own. The appellants argue that they were entitled to an instruction that put the burden of proving the affirmative defense of mechanical failure on the defendants. As noted above, the appellants must show the correctness of the proposed instruction as a threshold matter. Pierce, 753 F.2d at 425.

None of the cases cited by the appellants support the proposed instruction. In Nobles v. Unruh, 198 So.2d 245 (Miss.1967), the court held that a party who, in violation of the motor vehicle law, had entered another lane of traffic without ascertaining the safety of the move, "when either explained nor excused," was

negligent as a matter of law. Id. at 247. In Hinton v. McKee, 329 So.2d 519 (Miss.1976), the defendant's decedent had crossed the center line and collided with the plaintiff's vehicle. The court held that the defendant, who did not offer any proof to negate the negligence of the decedent but instead asserted an affirmative defense, had the burden of proving the affirmative defense by a preponderance of the evidence. Id. at 521. Neither of these cases indicate that a defendant has the burden to prove no negligence merely on a showing that the defendant crossed the center line.

The appellants nevertheless point out that an allegation of a sudden failure of the brakes was characterized as an affirmative defense in Bullock v. Sim Ramsey, Jr. Trucking Co., 207 So.2d 628 (Miss.1968). In Bullock the defendant admitted the plaintiffs

allegations but sought to avoid liability by urging the sudden failure of his brakes. Id. at 631.

Bump, however, did not raise an affirmative defense of sudden brake failure. The claims of the parties set forth in the Pretrial Order show that Bump and MTD did not accept the plaintiffs' factual allegations and plead sudden brake failure in avoidance. Instead, they opted during the course of trial to defend against the allegations of negligence. The charge submitted to the jury was entirely consistent with the defense, and properly put the burden of proving negligence on the appellants.

[10] The appellants contend that through interrogatories the defendants' accident reconstruction experts offered one theory of why the truck veered to the left, but four days before trial offered a different theory at deposition. The appellants argue that they

were surprised by the change in the theory and that the district judge erred in refusing to exclude the testimony of the experts at trial.

In response to interrogatories the defendants indicated that Dr. Roy Arnold and Dr. Henry Bass would testify that "the steering mechanism was disabled by the impact with the Harris LTD." In a supplementary response the defendants described the truck as "left front impaired." The statement of facts contained in the pretrial order stated that the Harris vehicle "str[uck] the left front wheel of Henry Bump's truck, turning the wheel in a northwesterly direction and disabling the steering gear of the truck." Dr. Bass later testified, however, that the steering mechanism itself was not disabled, but that wheels became bound when the Harris vehicle struck the left front of the truck. He agreed

that the words "steering mechanism" were imprecise but insisted that his conclusions remained the same.

We believe that any discrepancy in the theory is largely semantic, and accordingly conclude that the district judge did not abuse his discretion in admitting the testimony. See Woods v. International Harvester Co., 697 F.2d 635, 630-40 (5th Cir.1983).

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-4377

ROBINSON, et al

Plaintiffs-Appellants

v.

BUMP, et al

Defendants-Appellees

On Petition for Rehearing and
Suggestion for Rehearing En Banc
(March 21, 1990)

PER CURIAM:

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is denied.

ENTERED FOR THE COURT:

/s/ John M. Duhe'

UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

ROBINSON, et al	)	
	)	
Plaintiffs	)	CIVIL ACTION
	)	NO. 88-4377
	)	
BUMP, et al	)	MEMORANDUM
	)	OPINION
Defendants	)	

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND, ALTERNATIVELY, FOR A NEW TRIAL AND FOR AN ADDITUR

By: Hon. Glen H. Davidson
United States District
Judge

Subsequent to a lengthy jury trial that resulted in a plaintiff's verdict agsint the defendant Willis C. Harris and a verdict in favor of the defendants MTD Products, Inc. and Henry H. Bump, the post trial motion as above captioned came on for consideration by the court. The court has carefully reviewed the motion and authorities in support thereof, as well as the response thereto, together with the court's trial notes. The court in

applying the standards pronounced in this circuit in Howell v. Gould, Inc., 800 F.2d 482 (5th Cir.1986) and Boeing v. Shipman, 411 F.2d 365 (5th Cir.1969) is of the opinion that the motion is not well taken.

This finding is based on the numerous rulings and opinions that the court has heretofore made in the record sub judice. The court notes that when the plaintiffs brought to the court's attention the fact that the word "and" was underlined in interrogatory No. 2 that the court underlined the word "and" in interrogatory No. 3 prior to submission of the case to the jury. Further, the court notes that it is without authority to grant an additur as an alternative to a new trial. Dimick v. Schiedt, 293 U. S. 474 (1935).

As to the remaining grounds set forth in the motion the court is of the opinion that the verdict of the jury was supported by the evidence and should not now be disturbed.

Accordingly, the motion for judgment notwithstanding the verdict and alternatively for a new trial and for an additur is overruled and denied.

ENTER: This 2nd day of May, 1988.

s/Glen H. Davidson
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ESTELLA HAYNES ROBINSON,
ADMINISTRATRIX OF THE
ESTATE OF WILLIE
ROBINSON, JR., DECEASED,
et al JUDGMENT IN A CIVIL CASE

V.

CASE NUMBER DC84-221-D-O
DC84-224-D-O
DC84-227-D-O
DC84-228-D-O
DC84-231-D-O

HENRY M. BUMP, MTD PRODUCTS, INC.,
and WILLIS C. HARRIS
JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED:

That the plaintiffs, Estate and Beneficiaries of Willie Robinson, Jr., Deceased, do have of and recover from the defendant, Willis C. Harris, the sum of $200,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the plaintiffs, Estate and Beneficiaries of Shirley Granberry, Deceased, do have of an recover from the defendant, Willis C. Harris, the sum of $150,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the plaintiffs, Estate and Beneficiaries of Shalanda Granberry, Deceased, do have of and recover from the defendant,

Willis C. Harris, the sum of $100,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the plaintiffs, Estate and Beneficiaries of Patricia Perkins, Deceased, do have of an recover from the defendant, Willis C. Harris, the sum of $130,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the plaintiff, Debra Ann Johnson, do have of and recover from the defendant, Willis C. Harris, the sum of $1,500,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the plaintiff, Detrick Granberry, do have of and recover from the defendant, Willis C. Harris, the sum of $250,000.00, together with interest at the rate of 6.58% per annum from date until paid.

That the claims stated by the plaintiffs herein against the defendants, Henry M. Bump and MTD Products, Inc., are DISMISSED with prejudice; said defendants shall go hence with their costs.

That the cross-plaintiff, MTD Products, Inc., do have of and recover from the cross-defendant, Willis C. Harris, the sum of $67,750.00, together with interest at the rate of 6.58% per annum from data until paid.

That the cross-plaintiff, Henry M. Bump, do have of and recover from the cross-defendant, Willis C. Harris, the sum of $1,764.75, together with interest at the rate of 6.58% per annum from date until paid.

That the costs herein are assessed to the defendant, Willis C. Harris.

February, 17, 1988
Date

NORMAN L. GILLESPIE
Clerk

/s/ Rosalee K. Ellixson
Courtroom Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROBINSON, et al

Plaintiffs-Appellants

CASE NUMBER DC84-22-D-O
DC84-224-D-O
DC84-227-D-O
DC84-228-D-O
DC84-231-D-O

v.

BUMP, et al

Defendants-Appellees

EXCERPT FROM TRIAL TRANSCRIPT
(February 8, 1988

[621] Gentlemen, the Court takes up at this time the matter of the admissibility of the seat belt evidence, and I really believe that in doing so the Court must address the appropriateness in the case sub judice of a negligence per se instruction premised on the -- I actually think we are talking about two different things, whether a negligence per se instruction in warranted in

the case sub judice and whether simply the evidence of the fact that the defendant Bump was not utilizing a seat belt on the occasion complained of.

The applicable Code of Federal Regulations is found in 49 CFR, Section 392.16. In examining the law that applies to the question presented in the case sub judice, the Court looks to the Mississippi case of Strong v. Freeman Truck Lines, Inc., 456 So.2d at page 698, 1984 Mississippi case, and to a case cited by the plaintiffs in their offer with their jury instructions, Wallace v. Ener, a Fifth Circuit case at 521 F.2d, page 215, Fifth Circuit, 1975, a diversity case construing Georgia law.

[622] This Freeman Truck Line case involved a situation where an interstate limited access highway traversed a municipality. The Mississippi statute concerning the parking of a motor vehicle on a

highway and the federal highway regulation are practically the same, wherein when a truck or car is disabled on a travelled highway, the driver, responsible person, must take certain safety measures, i.e. posting of flares, reflectors, flags, and so forth, behind that vehicle. The Mississippi Supreme Court in the Freeman case held that the accident occurred outside of a business district, although it was inside an incorporated area, but on the interstate highway, and that the jury should have been so instructed as a matter of law that the violation of that statute and federal regulation under those circumstances, in the opinion of the State Supreme Court, did constitute negligence per se.

The Georgia case is very similar, Wallace v. Ener, in that a motorcyclist struck the rear of a truck that was parked on a highway, on the traveled portion of the

highway. That case again involved the placing of flares and flags, and so forth, behind a truck.

Clearly in both of those cases the injured plaintiff or the plaintiff's decedent was a member of a class that clearly was protected by the enactment of the regulation or statute, and clearly the facts in both cases involved injuries and death resulting directly from the subject matter of the [623] statute or regulation.

In this Court's opinion, the Mississippi case of Haver v. Hinson, 385 So.2d at page 605, Mississippi, 1980, is very similar factually to the case sub judice insofar as the applicability of the regulation is concerned. In the Hinson case a lady was parked in a residential area conversing with certain residents. A child of the residence apparently crawled under the motor vehicle

while the lady was talking to them, and when she left the premises, of course, the child was run over and injured.

Now, the Mississippi statute provides what side of the road a motorist will park on, and in the Hinson case the car was parked on the wrong side of the road. But the State Supreme Court held that the plaintiff was not entitled to a negligence per se instruction in that the driver, the defendant driver, was parked on the wrong side of the street in violation of the Mississippi Code, 63-3-601. The State Supreme Court stated, "We disagree with the contention that the plaintiff is entitled to a negligence per se instruction because the violation of a safety statute constitutes negligence per se only where the plaintiff is a member of the class sought to be protected by the statute and the resulting harm is of the type sought to be prevented by passage of the statute."

In the Court's opinion, this CFR concerning seat belts [624] was enacted for the purpose of protecting the wearer of the seat belt, the driver of the vehicle. It is the Court's opinion that the evidence that the defendant Bump's truck was equipped with a seat belt assembly and that it was not being worn or utilized on the occasion complained of should come in just as the evidence came in in the Hinson case that the driver of the car was parked on the wrong side of the street. In no event should this evidence from the basis of a negligence per se instruction and in no event should the provisions of the Code of Federal Regulation provision come before this jury. The Court is of this opinion, number one, in that the pretrial order in this case does not under the section entitled "Questions of Law," the Code of Federal Regulation provision is not mentioned, the seat belt is not mentioned, the issue was not preserved. It's not

preserved anywhere in the pretrial order in any mixed question of law and fact. In fact, the CFR provision is not mentioned in the pretrial order. The Court is of the opinion that you cannot interject questions of law at this late stage in this proceeding.

Number two, the plaintiff has not shown that the plaintiffs in the case sub judice are members of any protected class envisioned by the enactment of the regulation and that the resulting harm is of the type sought to be prevented by passage of the regulation.

Now, gentlemen, that's the ruling of the Court. I will [625] permit the simple fact that the seat belt was not being utilized by Mr. Bump to come into evidence. We have gone into every detail as to where his hands were, his feet were, what equipment and

everything, but it will not -- in no event will it be the subject of a negligence per se instruction.

MR. DUNBAR: May I ask the Court to reconsider, please, your ruling that the fact of the lack of a seat belt should come in for this reason, Your Honor: If that's not a breach of duty, if Your Honor has held under the law that is no breach of duty which the plaintiffs can claim advantage of, then how could it even be relevant?

THE COURT: You say it's not relevant?

MR. DUNBAR: It's not relevant to an issue in the case. And what would the plaintiffs be allowed to argue if you let it in? It should be something that should be argued to the jury later. And it should be something that should be able to be built into an instruction of law as to duty later, if it's admissible, if the Court please.

THE COURT: Well, Mr. Dunbar, I catergorize the evidence as just like the Hinson case, which side of the street was the car parked on. Clearly that evidence came in, but it was --

MR. DUNBAR: I don't mean to interrupt Your Honor, but I think the fair inference is that if that case were retried the Court would say it shouldn't come in because it's [626] not a breach of duty, therefore it's not a relevant fact. It just has no bearing on the case. You see, we are prejudiced, Your Honor, just as if you gave a negligence per se instruction. If this comes in and they are permitted to argue somehow that we have breached some kind of duty because we should have had a seat belt on and if we'd had a seat belt on, they will argue such and such, but if we have breached no duty to start with, it's just not an issue in the case. It's just not relevant to an issue, and

I would ask Your Honor please to reconsider that aspect of your ruling, please, and if you would do that, I --

THE COURT: Yes. Very well.

Mr. Bostick?

MR. BOSTICK: Your Honor, I would respectfully say that it is relevant, it is material. We already have a conflict in the evidence, that is, Mr. Bump stating that at all times he remained in this seat, at all times he had his hands on the steering wheel fighting for control of the vehicle. Then we have the testimony of Officer Reed saying, He told me the day after this accident that he had been knocked completely out across the dog, and from that standpoint, Your Honor, the issue being control, that it's material as to whether or not he did in fact have his -- and it goes and it assists the jury into who they are going to believe as to whether or not he did in fact stay in his seat, did in fact,

[627] keep his hands on the steering wheel, or was he knocked across the doghouses as he told Officer Reed the following day. And from that standpoint I submit it is relevant, it is material.

MR. THOMPSON: Your Honor, I was going to point out to Your Honor the 403 rule, Rule 403, that the jury now has the testimony from Officer Reed as to what the defendant Bump told him that is misleading, the jury sitting there, and they probably didn't know --

THE COURT: The Court has ruled. The Court is going to read the stipulated fact to the jury, but I tell you now, it will not form the basis of any instruction on negligence per se, and no evidence of the CFR provision will go to this jury. That's the ruling of the Court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROBINSON, et al

Plaintiffs-Appellants

v. CASE NUMBER: DC84-221-D-O
DC84-224-D-O
DC84-227-D-O
DC84-228-D-O
DC84-231-D-O

BUMP, et al

Defendants-Appellees

EXCERPT FROM TRIAL TRANSCRIPT
(FEBRUARY 16, 1988)

[1778] THE COURT: Now, No. 13 has to do with the seat belt. The Court has heretofore ruled on that. But for the record, I will make a brief statement for the record. The stipulation concerning the seat belts and the utilization or lack of utilization in the Bump-MTD truck was admitted by the court in light of the conflict in Officers Reed's testimony, that Mr. Bump, the day after the incident, told him that he was thrown from the driver's seat onto the doghouse or control

panel by the first collision, the Harris collision, and then at the trial Mr. Bump testified that he remained in the driver's seat [1779]and behind the steering wheel in the interlude between the Harris collision and the Robinson collision.

The Court is of the opinion that, pursuant to Rule 401 of the Federal Rules of Evidence, the testimony and stipulation was relevant to the issue of Bump's control of the vehicle on the occasion complained of.

Pursuant to the pronouncement of the Mississippi Supreme Court in Haver v. Hinson, 385 So. 2d, page 605, Mississippi, 1980, wherein the Court held that the violation of a safety regulation or statute constitutes negligence per se only where the plaintiff is a member of the class sought to be protected by the statute and the resulting harm is the type sought to be prevented by the passage of the statute or regulation would the failure to

utilize this equipment constitute negligence per se. Therefore, the Court is not and will not give a negligence per se instruction on the issue of Mr. Bump's failure to wear a seat belt.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROBINSON, et al

Plaintiffs-Appellants

CASE NUMBER: DC84-221-D-O
DC84-224-D-O
DC84-227-D-O
DC84-228-D-O
DC84-231-D-O

v.

BUMP, et al

Defendants-Appellees

EXCERPT FROM TRIAL TRANSCRIPT
(February 2, 1988)

THE COURT: Well, we know he's going to testify that he has the fuzz-buster, the seat belts --

MR. THOMPSON: Mirrors.

THE COURT: -- mirrors.

MR. BOSTICK: And a CB.

MR. THOMPSON: And a CB, for whatever that's worth. Lots of different equipment.

MR. DUNBAR: It's a matter for argument, Your Honor, as well as the fact -- correct me if I'm wrong -- I don't think these are issues in the pretrial order.

MR. THOMPSON: Well, it's certainly no surprise to anybody.

MR. DUNBAR: No.

MR. THOMPSON: You objected to the introduction of the fuzz-buster as a matter of not being relevant under the Rule 401. Objected to the use of the seat belts, too. It's just primarily argument whether or not it's relevant and admissible.

UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ROBINSON, et al

Plaintiffs-Appellants

v.

CASE NUMBER: DC84-221-D-O
DC84-224-D-O
DC84-227-D-O
DC84-228-D-O
DC84-231-D-O

BUMP, et al

Defendants-Appellees

EXCERPTS FROM
PRE-TRIAL ORDER

(ENTERED AUGUST 5, 1987
FINAL PRE-TRIAL CONFERENCE FEBRUARY 4, 1986)

The following is a concise summary of the ultimate facts as claimed by:

a. All Plaintiffs: As to Liability:

On the night of November 2, 1984, Willie Robinson, Jr., was driving his automobile in a southerly direction on U.S. Highay 61,

approximately five miles South of Walls, Mississippi. He was driving slowly and carefully on the right hand side of the highway. Passengers in the Robinson automobile were: Debra Ann Johnson, Detrick Granberry, Patricia Ann Perkins, Shirley Granberry and Shalanda Granberry. Immediately preceding the automobile driven by Mr. Robinson was an automobile driven by Defendant, Willis Harris, also proceeding in a southerly direction. At the same time, Defendant, Henry Bump, was driving a tractor-trailer unit for Defendant, MTD Products, in a northerly direction along the highway.

Near such point there is a railroad overpass to the South and a bayou bridge North of the overpass. At or just beyond the crest of the overpass, an unidentified automobile began to pass the truck, which was gaining speed going down the overpass headed North. An automobile driven in a southerly direction

by Dewey Dickens was near the North end of the bridge approaching the truck and the passing car, ahead of the automobiles driven by Mr. Harris and Mr. Robinson, when he saw two sets of headlights running side by side, realized there was a problem and applied his brakes.

MR. Bump, the driver of the MTD Products truck, failed to keep a proper lookout to the rear. Just before the truck entered the bridge, Mr. Bump saw the lights of the Dickens automobile dip, looked in his mirror and saw the passing car at his side. He had seen the passing car earlier, when the passing car was South of the four lanes portion of the highway, South of the overpass, traveling fast. He had seen it in the rearview mirror really gaining on his truck prior to reaching the south foot of the overpass. He says as he crested the overpass he saw two cars behind him. He never looked to his rear again until he was entering the bridge.

Mr. Bump was operating the truck too fast for conditions and in excess of the fifty-five miles per hour speed limit. Mr. Bump claims when he first applied his brakes as his rig was entering the bridge, he had his hand on the gear shift, going from ninth gear, which covers forty-five to fifty-six miles per hour, to the tenth, or last, gear. However, the evidence indicates that the speed of the truck was even greater. The speed of the truck before the brakes were applied has been determined by Dr. Thomas Talbot, an accident reconstruction expert, to be at least sixty-five miles per hour. The passing car was finally able to pass the truck and re-enter the northbound lane, at or near the South end of the bridge.

Mr. Bump failed to have the truck under control. Mr. Dickens, who avoided the collision, stated that Mr. Bump was wrestling with the steering wheel, the trailer was

bouncing and swaying, swerving twelve to eighteen inches towards Dickens, about to take flight and he was afraid the truck was going to jack-knife and strike his automobile. It appears that skid marks made by the trailer proceed toward the southbound lane before the point of impact between the tractor and the Harris automobile.

Mr. Harris failed to have his automobile under control. Mr. Harris, on seeing the Dickens automobile nearly stop ahead of him and the truck approaching and going out of control, slammed on his brakes. In slamming on his brakes, his automobile skidded or drifted to the left. The tractor of the truck and the Harris automobile collided to the East of the center line, near the middle of the bridge, according to a gouge mark located by Officer Bobby Reed. The Harris automobile was spun around and driven backwards into the bridge abutment.

Mr. Bump failed to slow or stop the truck safely. The only skid marks of the truck North of the place where the collision with the Harris automobile occurred are front wheel tractor brakes, Mr. Bump should have been able to apply his brakes and stop before the collision with the Robinson automobile, but was unable to do so. It appears that he either did not fully apply the brakes, fearing a jack-knife, or not wearing seat belts, was thrown out of position in the collision with the Harris automobile.

The MTD unit proceeded in the northbound lane for a distance, then crossed into the southbound lane of traffic, occupied by the Robinson automobile and continued to come forward on this side of the road, directly into the path of the Robinson vehicle and struck this automobile headon with great force. It then took the Robinson car with it and struck the bridge abutment, near the North

end of the bridge, driving the Robinson automobile back along the guard rail pilings at the North end of the bridge and causing it to catch fire. The truck moved a distance of more than three hundred feet from the place where its brakes were first applied until it struck the Robinson automobile; it moved a distance of more than five hundred feet from the place where its brakes were applied until it finally came to rest.

Mr. Bump was not wearing seat belts and hit his head on the roof, cutting it so that forty stitches were required, in one of the collisions. The trailer brakes were adjusted by another company. Previous repairs for air leaks had been made.

Debra Ann Johnson and Detrick Granberry were seriously injured and Willie Robinson, Jr., Shirly Granberry, Patricia Ann Perkins

and Shalanda Granberry were killed in the accident. Witnesses heard groans come from the Robinson automobile.

....

The contested issues of fact are as follows:

1. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the negligence of Bump by (a) failing to keep a proper lookout to the rear; (b) operating his vehicle at an excessive speed under the circumstances then and there existing; (c) failing to maintain proper control; (d) failing to brake properly; (e) failing to yield one half of the roadways.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROBINSON, et al

Plaintiffs-Appellants

v.

CASE NUMBER: DC84-221-D-O
DC84-224-D-O
DC84-227-D-O
DC84-228-D-O
DC84-231-D-O

BUMP, et al

Defendants-Appellees

EXCERPT FROM RECORD
(R. 497, FILED JANUARY 25, 1988)
MOTION IN LIMINE

COMES NOW Henry M. Bump and MTD Products, Inc., two of the Defendants in the above styled and numbered cause, through counsel, and respectfully move the Court in limine for an order excluding certain evidence from presentattion at trial, as follows:

.... All evidence regarding the fact that Defendant Henry M. Bump was not wearing seat belts at the time of the collision in

question. In support thereof Defendants state that this evidence is irrelevant and, if found to be relevant, is unfairly prejudicial pursuant to F.R.E. 403. Defendants further state that the failure to wear seat belts in the State of Mississippi is not evidence of negligence. See D. W. Boutwell Butane Co. v. Smith, 244 So.2d 11 (Miss. 1971)

PERTINENT TEXTS OF STATUTORY PROVISIONS

1. Federal Rules of Civil Procedure

Rule 16 which in pertinent part is as follows:

> .... (c) **Subjects to be discussed at Pre-trial conferences.** The participants at any conference under this rule may consider and take action with respect to (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
>
> .... (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
>
> (8) the form and substance of the pretrial order;
>
> ....(e) **Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Fed. R. Civ. P. 16.

2. The seat belt regulation of the Federal Highway Administration reads as follows:

> A motor vehicle which has a seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself with the seat belt assembly.

49 C.F.R. § 392.16 (1984)

FILED
AUG 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1996 (2)

In The

Supreme Court of the United States

October Term, 1989

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX OF THE ESTATE OF WILLIE ROBINSON, JR., AND THE REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF WILLIE ROBINSON, JR.; COMILLA PERKINS AS REPRESENTATIVE OF THE HEIRS AT LAW OF PATRICIA ANN PERKINS, DECEASED; DEBRA ANN JOHNSON, A MINOR, BY AND THROUGH JOHNNIE MAE JOHNSON, HER MOTHER AND NEXT FRIEND; AND DETRICK GRANBERRY, A MINOR, BY HIS FATHER AND NEXT FRIEND, ALONZO GRANBERRY, AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF SHALANDA GRANBERRY,

Petitioners,

v.

MTD PRODUCTS, INC., AND HENRY M. BUMP,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

This case arises out of a multi-car accident involving the petitioners' vehicles and the respondents' truck. The petitioners filed suit against Henry M. Bump, the driver of the truck, and his employer, MTD Products, alleging that the truck was negligently operated.[1] Jurisdiction was based on diversity of citizenship and, pursuant to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the district court applied Mississippi law.

The accident in question occurred after a small white car attempted to pass Bump's truck on a bridge on a two-lane highway. (T. 306, 1206). Both the truck and the white car were northbound. (T. 306, 1206). There were also three cars proceeding southbound: the first driven by Dewey Dickens, the second driven by Willis C. Harris, and the third driven by Willie Robinson, Jr. (R.2 378, 208). Both Bump and Dickens slowed to allow the white car to re-enter Bump's lane. (T. 211, 217, 314).[2] Harris, the driver of the second southbound vehicle, braked in an attempt to avoid rear-ending Dickens, lost control of his car and struck the right side of the bridge. (T. 321, 1209). Harris' vehicle bounced off the bridge railing, crossed the center line, and struck the left front wheel of Bump's truck. (T. 324, 1125, 1209). After the collision with Harris, Bump's

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[1] The respondents are generally referred to collectively herein as "MTD." MTD Products has no parent company and has only wholly-owned subsidiaries. This statement is provided in compliance with Sup.Ct.R. 29.1.

[2] Although the Mississippi Highway Patrol attempted to identify the driver or owner of the white car, their attempts to do so were unsuccessful. (T. 469-70).

truck crossed the center line of the highway and struck the Robinson vehicle. (T. 325).

At trial, the petitioners and respondents each presented different theories as to why Bump's truck crossed the center line and hit the Robinson car. MTD presented evidence that the initial collision between Harris' vehicle and Bump's truck disabled the truck's steering mechanism, causing it to veer uncontrollably across the center line. (T. 1338-1341, 1527). The petitioners presented evidence that Bump was simply thrown from his seat by the force of the initial collision with Harris, leaving Bump unable to steer or brake the truck because he was no longer in the driver's seat.

Approximately two years before trial, the district court held a pretrial conference, and a pretrial order was entered approximately six months prior to trial.[3] The pretrial order stipulated that Bump's truck was equipped with seat belts and that Bump was not wearing his seat belt at the time of the accident. (App. 8). The summary of the ultimate facts prepared by the petitioners for the pretrial order contained the following statement:

> It appears that [Bump] either did not fully apply the brakes, fearing a jack-knife, or not wearing seat belts, was thrown out of position in the collision with the Harris automobile.
>
> . . . .

---

[3] As discussed below, under Uniform Local Rule 10(g) the petitioners were entitled to move to amend the pretrial order at any time during these six months, or even during the trial itself. However, no such motion to amend was ever made.

> Mr. Bump was not wearing seat belts and hit his head on the roof, cutting it so that forty stitches were required, in one of the accidents.
>
> – (App. 5, 6).

MTD reserved the right to object on the basis of relevancy to the stipulation that Mr. Bump was not wearing his seat belt. MTD also reserved the right to explain this stipulation to the jury. (App. 8).

The pretrial order listed, *inter alia*, the following contested issue of fact:

> 1. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the negligence of Bump by (a) failing to keep a proper lookout to the rear; (b) operating his vehicle at an excessive speed under the circumstances then and there existing; (c) failing to maintain proper control; (d) failing to brake properly; (e) failing to yield one half of the roadways[.]
>
> – (App. 8).

There were no contested issues of law listed with regard to Bump and MTD, other than the question of whether Harris' negligence or that of the driver of the white car might operate as an independent superseding cause of the accident. (App. 9). The petitioners did not move to amend the pretrial order at any time prior to or during trial.

Before trial, MTD filed a motion in limine seeking, *inter alia*, to exclude the evidence that Bump was not wearing his safety belt. (App. to Pet. for Cert. 53-54).

MTD argued that this evidence was irrelevant under state law and cited Mississippi cases holding that failure to wear a seat belt does not constitute evidence of negligence. (*Id.*); *see, e.g., D. W. Boutwell Butane Co. v. Smith,* 244 So. 2d 11 (Miss. 1971).

In response, the petitioners cited 49 C.F.R. § 392.16, a federal regulation mandating that truck drivers wear seat belts. The petitioners argued that the federal regulation preempted state law and thus also preempted the Mississippi cases holding that evidence of failure to wear a seat belt is not admissible to prove negligence. The petitioners cited *Stong v. Freeman Truck Lines, Inc.,* 456 So. 2d 698 (Miss. 1984), a Mississippi case holding that the failure to comply with a federal regulation constitutes negligence per se if the injured party is a member of the class the regulation was designed to protect. *Stong,* 456 So. 2d at 707. At that time, however, the petitioners gave no indication that they intended to proceed on a theory that failure to wear a safety belt constituted negligence per se, and they produced no authority for the proposition that the regulation was designed for their benefit. Instead, they simply argued that the regulation rendered Bump's failure to wear a seat belt relevant to the issue of his control over the truck. The district judge did not rule on the motion in limine prior to trial. (App. 11-12).

At trial, the petitioners sought to introduce evidence that Bump was not wearing his seat belt. (App. 13-22). In response, MTD argued that any evidence of Bump's failure to wear his seat belt was not relevant. (App. 13-22). The petitioners contended that Bump's failure to wear his seat belt was relevant to his failure to maintain control of the truck — a contested fact issue specifically listed in the

pretrial order. (App. 16, 17-20). Although the petitioners cited *Stong* in support of their argument, they again failed to indicate in any way that they intended to rely on a negligence per se theory. (App. 13-22). They still presented no authority or proof to support the proposition that they were members of a class that the regulation was designed to protect.

The district court initially held irrelevant any evidence of Bump's failure to wear his seat belt, because there was no evidence before the court showing that Bump's failure to do so was related to his alleged failure to maintain control of the truck. (App. 20-22). After evidence that Bump might have been thrown from his seat during the collision with Harris was admitted, the district judge reconsidered his earlier ruling and allowed the petitioners to introduce evidence that Bump had not been wearing his seat belt. (App. to Pet. for Cert. 34, 35). The petitioners were also allowed to argue to the jury that this affected Bump's ability to control the truck. (App. to Pet. for Cert. 9 n.2, 34-38).

The petitioners later sought to use the evidence of Bump's failure to wear his seat belt as grounds for requesting a negligence per se instruction. (App. to Pet. for Cert. 29-36, 40-42). The district judge denied the requested instruction (App. to Pet. for Cert. 29-36), and gave two reasons for his ruling: (1) the issue of whether or not failure to wear a safety belt could constitute negligence per se was not preserved as an issue of law in the pretrial order; and (2) under Mississippi law, negligence per se was not applicable because the petitioners had not shown that the federal regulation in question was designed to benefit the general public, as opposed to the

truck driver. (App. to Pet. for Cert. 29-36). Even after the district court based its ruling partially on the petitioners' failure to preserve the negligence per se issue in the pretrial order, the petitioners did not move to amend that order as allowed by Uniform Local Rule 10(g). (App. 1).

The district court considered the negligence per se issue one last time during the charge conference. (App. to Pet. for Cert. 40-42). The judge again determined that a negligence per se instruction was inappropriate, reasoning that, on the evidence before the court, the regulation was for the benefit of the truck driver and not for the protection of the public. (App. to Pet. for Cert. 40-42).

At no time during trial did the petitioners present to the district court the regulatory history of the federal seat belt regulation. Even after the district court initially held that the regulation was for the benefit of the truck driver only, the petitioners never came forward with any authority refuting this finding. The only evidence presented to the district judge on this point was the regulation itself.

The jury returned its verdict by answering special interrogatories. (T. 2060-63). In response to a combined question asking both whether Bump was negligent and whether his negligence was a proximate cause of the petitioners' injuries, the jury replied "no." (T. 2061). The jurors determined that Harris was negligent and that his negligence was the proximate cause of the accident. (T. 2061). They returned substantial verdicts for the petitioners against Harris. (T. 2061-62).

The petitioners appealed the verdict in favor of MTD. On appeal, they contended, *inter alia*, that the district court erred in refusing their requested jury instruction on

negligence per se regarding seat belt use. (App. to Pet. for Cert. 6). The Fifth Circuit affirmed the district court's ruling, holding that the petitioners waived the negligence per se issue by failing to raise it as a contested issue of law in the pretrial order. (App. to Pet. for Cert. 7-9). The petitioners argued that the district judge ultimately rested his ruling solely on the ground that the regulation was for the benefit of the truck driver rather than the public, because the district judge did not mention the pretrial order the second time he considered the negligence per se issue. (App. to Pet. for Cert. 8). The Fifth Circuit determined, however, that there was no support in the record for any argument that the district judge reconsidered or withdrew his earlier ruling that this issue was waived through failure to preserve it in the pretrial order. (App. to Pet. for Cert. 8-9).

REASONS FOR DENYING CERTIORARI

I. THERE IS NO CONFLICT AMONG THE CIRCUITS IN CONSTRUCTION OF PRETRIAL ORDERS

The petitioners contend that there is a conflict among the circuits on the issue of whether pretrial orders should be broadly or narrowly construed. According to the petitioners, the Fifth Circuit Court of Appeals narrowly construes the issues presented in pretrial orders, while the First, Sixth, and Tenth Circuit Courts of Appeals favor a rule of broad construction. In fact, any difference between the standards applied by the various circuits appears to be primarily a matter of semantics.

Federal Rule of Civil Procedure 16(e) reads as follows:

> **(e) Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

The language of Rule 16 recognizes that a pretrial order "control[s] the subsequent course of the action unless [it is] modified." In its notes on the 1983 amendment to Rule 16(c), the advisory committee stated as follows:

> Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. *If counsel fail to identify an issue for the court, the right to have the issue tried is waived.* Although an order specifying the issues is intended to be binding, it may be amended at trial to avoid manifest injustice. See Rule 16(e). *However, the rule's effectiveness depends on the court employing its discretion sparingly.*

(emphasis added). Thus, the text and comments to Rule 16 itself recognize that issues not preserved at the pretrial conference and in the pretrial order are waived.

This rule is consistent with the functions served by the pretrial conference and the resulting order. One of the main functions of the pretrial conference procedure is to clarify the issues to be litigated. *Ely v. Reading Co.*, 424 F.2d 758, 762 (3rd Cir. 1970); *Walker v. West Coast Fast Freight*, 233 F.2d 939, 941 (9th Cir. 1956) (major purpose of pretrial order is to eliminate surprise by sharpening and simplifying the issues to be tried). "Unless pretrial orders are honored and enforced, the objectives of the pretrial

conference to simplify issues and avoid unnecessary proof by obtaining admissions of fact will be jeopardized if not entirely nullified." *United States v. First National Bank of Circle*, 652 F.2d 882, 886 (9th Cir. 1981); *see also Ely*, 424 F.2d at 762 (effectiveness of procedure is destroyed if counsel are permitted to change positions taken at pretrial).

Courts in all of the circuits routinely exclude evidence or issues at trial on the ground that they were not preserved in the pretrial order. *See, e.g., R. L. Clark Drilling Contractors, Inc. v. Schramm, Inc.*, 835 F.2d 1306, 1308 (10th Cir. 1987) (court properly excluded choice of law issue where it was not preserved in the pretrial order); *Erff v. Markhon Industries*, 781 F.2d 613, 616-618 (7th Cir. 1986) (issue properly excluded where not preserved in pretrial order); *Itel Capital Corporation v. Cups Coal Company*, 707 F.2d 1253, 1261 (11th Cir. 1983) (conspiracy claim properly excluded where pretrial order contained no mention of claim); *Colvin v. United States*, 549 F.2d 1338, 1340 (9th Cir. 1977) (evidence proffered to show that time and materials agreement was a sham was properly excluded where not preserved in pretrial order); *Labbee v. Roadway Express, Inc.*, 469 F.2d 169, 172 (8th Cir. 1972) (court properly excluded evidence that truck driver was fatigued because this was not one of the allegations of negligence in the pretrial order); *Ely*, 424 F.2d at 762-63 (court properly excluded evidence concerning train signals and excluded testimony of expert on same because not listed in pretrial order); *Moore v. Sylvania Electric Products*, 454 F.2d 81, 83-84 (3rd Cir. 1972) (court did not err in excluding issue of negligence per se where common law negligence was only issue preserved in pretrial

order); *Kline v. S. M. Flickinger Co.*, 314 F.2d 464, 466-67 (3rd Cir. 1963) (court properly excluded evidence of design defect where pretrial order only preserved issue of negligence); *Wiggins v. City of Philadelphia*, 331 F.2d 521, 526 (3rd Cir. 1964) (court properly excluded evidence of design defect where issue was not preserved in pretrial order); *Walker*, 233 F.2d at 942 (court properly excluded evidence of plaintiff's difficulties in childbirth because issue not adequately preserved in pretrial order); *Sartori v. United States*, 186 F.2d 679, 682 (10th Cir. 1950) (court properly excluded evidence of ineffective respirators when this was not one of grounds of negligence listed in pretrial order); *see also* cases collected in *Circle*, 652 F.2d at 886 n.5.[4]

Further, the universal rule is that a district judge's interpretation of a pretrial order is reviewed only for abuse of discretion. *Swift v. State Farm Mutual Automobile Insurance Company*, 796 F.2d 120, 122 (5th Cir. 1986); *Flannery v. Carroll*, 676 F.2d 126, 130 (5th Cir. 1982); *Rodrigues v. Ripley Industries, Inc.*, 507 F.2d 782, 787 (1st Cir. 1984); *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 818 (10th Cir. 1979).

The petitioner specifically cites cases from the First, Sixth, and Tenth Circuits that state, usually in a general discussion of the applicable law, that pretrial orders should be broadly construed. *Howard v. Kerr Glass Manufacturing Co.*, 699 F.2d 330, 333 (6th Cir. 1983); *Geremia v.*

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[4] There are also cases from many circuits holding that the court may refuse to give a jury instruction on an issue that is not preserved in the pretrial order. *Glismann v. AT&T Technologies, Inc.*, 827 F.2d 262, 267 (8th Cir. 1987); *Derewecki v. Pennsylvania R.R. Co.*, 353 F.2d 436, 445 n.10 (3rd Cir. 1965); *Miller v. Brazel*, 300 F.2d 283, 287 (10th Cir. 1962).

First National Bank of Boston, 653 F.2d 1, 5 (1st Cir. 1981); *Trujillo*, 608 F.2d at 818; *Rodrigues*, 507 F.2d at 787.

None of these cases, given the abuse of discretion standard and the varying facts in each case, is inconsistent with the approach taken by other circuits and by the Fifth Circuit. *Rodrigues*, although stating that pretrial orders should be construed broadly, excluded evidence concerning a specific defect in a machine stating, "[y]et we cannot hold that the district court abused its discretion in ruling that plaintiff's murky pre-trial statement did not in the circumstances fairly apprise Ripley of the momentary contact claim." 507 F.2d at 787. *Geremia*, a First Circuit case, quoted the broad construction language from *Rodrigues*, but based its holding on the district court's failure to adopt the pretrial order: "because the memorandum here was never specifically adopted by the court, any purported preclusion of issues therein cannot be viewed as restricting the court's considerable discretion in this area." 653 F.2d at 5.

Howard involved a situation where a particular theory of recovery was not contained in the pleadings but was "unquestionably" covered in the pretrial order. The court found that, under these circumstances, the pretrial order should be viewed as superseding the pleadings in the case. 699 F.2d at 332-33. *Trujillo*, relied on extensively by the petitioners, specifically recognized that "[a] trial judge may . . . reject contentions not included in a proper pretrial order." 608 F.2d at 817. In addition, the Tenth Circuit has, in a number of cases, excluded issues or evidence that have not been preserved in a pretrial order. *See, e.g., Sartori*, 186 F.2d at 682.

Considering the varying and situation-specific nature of the issues involved in these cases, the varying degrees to which issues have been preserved in the individual pretrial orders involved, and the wide discretion accorded the district judge in determining whether issues are sufficiently preserved, it is not surprising that different cases involving interpretation of pretrial orders appear to employ varying levels of leniency. This apparent difference is, however, superficial. One, bottom-line rule is employed throughout each of the fact-specific cases from the various circuits, i.e., the principle embodied in Rule 16 itself that an issue not preserved in the pretrial order is waived.

This court has previously declined to review a case that presented the issue of exclusion of evidence on the ground that it was not preserved in the pretrial order. *Payne v. S. S. Nabob*, 302 F.2d 803 (3rd Cir.), *cert. denied*, 371 U.S. 870 (1962). This case presents no special or important issues regarding application of Rule 16 that would merit a grant of certiorari.

Even assuming, *arguendo*, that different circuits are applying different standards to interpretation of pretrial orders, the pretrial order in question here, even if broadly construed, did not preserve the issue of whether Bump's failure to wear his seat belt might constitute negligence per se. Seat belts were mentioned only three times in the entire pretrial order: twice in the petitioners' summary of facts and once in the stipulations. The federal regulation at issue here, 49 C.F.R. § 392.16, was not mentioned

anywhere in the pretrial order.[5] The doctrine of negligence per se was not mentioned anywhere in the pretrial order. Bump's failure to wear a seat belt was not listed in either the "contested issues of fact" or the "contested issues of law" section as an indication of Bump's alleged negligence.[6]

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[5] The petitioners note that the pretrial order did not mention the state statutes that set a maximum speed of 55 miles per hour and require a driver to remain on the right-hand side of the road. They contend that they treated the federal regulation the same way; thus, if the application of these other statutes was preserved, the application of the federal regulation was also preserved. The petitioners did not, however, argue that they were entitled to a negligence per se instruction based on Bump's alleged speed in excess of 55 miles per hour or on his undisputed failure to keep the truck on the right-hand side of the road. Had they attempted any such argument, the district court might well have held that these legal issues were not preserved by the pretrial order, either.

The evidence of Bump's failure to wear his seat belt was, in fact, treated in exactly the same manner as the evidence regarding speed and failure to remain on the right-hand side of the road. The petitioners were allowed to present their evidence on the seat belt question and argue that it affected Bump's control of the truck.

[6] In this sense, the district judge did apply a broad rule of construction in allowing failure to wear a seat belt to be introduced or argued at all. This is particularly true where the issues used by the petitioners for comparison — "excessive speed under the circumstances" and "failing to yield one half of the roadways" — were specifically detailed in the pretrial order as grounds for their negligence claims against MTD. (App. 8, excerpts from contested fact issues section of pretrial order at ¶ 1).

The mere mention of Bump's failure to wear his seat belt in the summary of ultimate facts and in the stipulations section of the pretrial order did not place either the court or MTD on notice that the petitioners intended to raise an issue of law regarding application of the doctrine of negligence per se.[7] Thus, even construing the pretrial order in this case broadly, the contested legal issue of negligence per se was not preserved.

Moreover, the petitioners never exercised their right under Uniform Local Rule 10(g) to move to amend the pretrial order to include the negligence per se issue, which right existed even as late as the moment at trial when the district court ruled that the issue was not contained in the pretrial order. (App. 1, Uniform Local Rule 10(g)).[8] Accordingly, it is questionable whether the

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[7] The petitioners cite to the trial transcript and argue that respondents "admitted" that the seat belt issue was not a surprise. MTD did anticipate, based on the petitioners' fact summary and request for a stipulation regarding seat belts, that petitioners would attempt to introduce evidence that Bump was not wearing his seat belt. MTD moved in limine to exclude this evidence, contending that it was irrelevant. The petitioners' current argument concerning the federal regulation, however, and application of negligence per se were nowhere presented in the pretrial order. MTD had no knowledge or notice that the petitioners intended to make this argument. When MTD's counsel responded "no" to the statement of petitioners' counsel that the seat belt issue was no surprise, MTD's counsel was obviously referring to the question of admission of evidence of Bump's failure to wear his seat belt — not to the negligence per se issue. (App. 13-14).

[8] Contrary to petitioners' contention, the time lapse between the pretrial conference, entry of the pretrial order, and

(Continued on following page)

petitioners took all necessary steps to preserve their first question for review.

II. THE PETITIONERS ARE BARRED FROM RAISING THE HISTORY OF THE FEDERAL SEAT BELT REGULATION BECAUSE THEY FAILED TO RAISE IT IN THE DISTRICT COURT

The petitioners contend that the regulatory history of 49 C.F.R. § 392.16 demonstrates that it was intended for the benefit of both the general public and truck drivers. Regardless of the merit of the petitioners' argument, which the respondents do not concede, the petitioners are barred from raising this regulatory history at this time, because they failed to present it to the district court.

Under Mississippi law, violation of a safety statute or regulation constitutes negligence per se only where (1) the plaintiff is a member of the class sought to be protected by the statute or regulation, and (2) the resultant harm is of the type sought to be prevented by the passage of the statute or regulation. *Haver v. Hinson*, 385 So. 2d 605, 608 (Miss. 1980). Mississippi has specifically held that, in order to be entitled to a negligence per se instruction, the plaintiff bears the burden of showing the trial court that he is part of the class of persons the statute was intended to protect and that the harm he suffered was of the kind that the statute was designed to prevent. *U-Haul Company v. White*, 232 So. 2d 705, 708 (Miss. 1970).

(Continued from previous page)

the time of trial does not work in their favor on this point. *See Colvin v. United States*, 549 F.2d at 1340; *Payne v. S. S. Nabob*, 302 F.2d at 806.

The petitioners clearly did not meet this state-law burden. The only evidence they presented to the district court concerning the purpose of the federal regulation was the text of the regulation itself.[9] The district court's construction of the regulation, absent the informative regulatory history, was reasonable. The district court's allegedly erroneous ruling that violation of this particular federal regulation did not constitute negligence per se, if indeed erroneous, was merely the result of the petitioners' failure to carry their burden under state law. That failure was expressly noted by the district court. (App. 35).

In this context, it is clear that neither the district court nor the Fifth Circuit held, as the petitioners' second question for review suggests, that the regulation in question can never provide the basis for a negligence per se instruction under Mississippi law. This Court should not grant certiorari to correct any error caused by the petitioners' failure to discharge their burden of proof.

In addition, even assuming for the sake of the argument that an error was committed in failure to allow a negligence per se instruction under state law, that error was essentially a function of misapplication of Mississippi law. It does not present a federal question worthy of this Court's consideration.

Although Mississippi law provides that violation of a federal regulation may constitute negligence as a matter of law under certain specific circumstances, there is no

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[9] The petitioners first presented the regulatory history for consideration in their brief while this case was on appeal to the Fifth Circuit.

requirement, constitutional or otherwise, that Mississippi law so provide. Mississippi could as easily provide that violation of a statute or regulation never establishes negligence as a matter of law. No grant of certiorari from this Court is warranted based on the fact that the district court may have misapplied Mississippi's state law standards for determining when violation of a federal regulation establishes negligence as a matter of law.

CONCLUSION

Based on the foregoing, the respondents, MTD Products, Inc., and Henry M. Bump, respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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UNIFORM LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN AND SOUTHERN DISTRICTS OF MISSISSIPPI

* * *

RULE 10. PRETRIAL CONFERENCES AND PRETRIAL ORDERS

* * *

(g) Effect of Pretrial Order. The pretrial order shall control the subsequent course of the action unless modified by the Trial Judge at the trial or prior thereto, upon oral or written motion, to prevent manifest injustice.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ESTELLA HAYNES ROBINSON, ET AL — PLAINTIFFS

VS. — NO. DC 84-221-GD-0

HENRY M. BUMP, ET AL — DEFENDANTS

ALONZO GRANBERRY, Father and Next Friend of DETRICK GRANBERRY, A Minor — PLAINTIFF

VS. — NO. DC 84-224-NB-0

HENRY M. BUMP, ET AL — DEFENDANTS

COMILLA PERKINS, as Representative of the Heirs at Law of PATRICIA ANN PERKINS, Deceased — PLAINTIFF

VS. — NO. DC 84-227-NB-0

MTD PRODUCTS, INC., HENRY M. BUMP, and WILLIE C. HARRIS — DEFENDANTS

DEBRA ANN JOHNSON, A Minor, By and Through JOHNNIE MAE JOHNSON, Her Mother and Next Friend — PLAINTIFF

VS. — NO. DC 84-228-NB-0

MTD PRODUCTS, INC., HENRY M. BUMP, and WILLIE C. HARRIS — DEFENDANTS

ALONZO GRANBERRY, Father and Next Friend of DETRICK GRANBERRY, A Minor — PLAINTIFF

VS. — NO. DC 84-231-NB-0

MTD PRODUCTS, INC. and WILLIE HARRIS — DEFENDANTS

[EXCERPTS FROM PRETRIAL ORDER ENTERED AUGUST 5, 1987]

1. A pretrial conference was held in this matter on the 4th day of February, 1986, at 10:30 A.M. at the United States Courthouse at Clarksdale, Mississippi before United States Magistrate J. David Orlansky.

* * *

3. The pleadings are amended to conform with this pretrial order.

* * *

7. The following is a concise *summary* of the ultimate facts as claimed by:

a. All Plaintiffs: As to Liability:

On the night of November 2, 1984, Willie Robinson, Jr., was driving his automobile in a southerly direction on U.S. Highway 61, approximately five miles South of Walls, Mississippi. He was driving slowly and carefully, on the right hand side of the highway. Passengers in the Robinson automobile were: Debra Ann Johnson, Detrick Granberry, Patricia Ann Perkins, Shirley Granberry and Shalanda Granberry. Immediately preceding the automobile driven by Mr. Robinson was an automobile driven by Defendant, Willis Harris, also proceeding in a southerly direction. At the same time, Defendant, Henry Bump, was driving a tractor-trailer unit for Defendant, MTD Products, in a northerly direction along the highway.

Near such point there is a railroad overpass to the South and a bayou bridge North of the overpass. At or just beyond the crest of the overpass, an unidentified

automobile began to pass the truck, which was gaining speed going down the overpass headed North. An automobile driven in a southerly direction by Dewey Dickens was near the North end of the bridge approaching the truck and the passing car, ahead of the automobiles driven by Mr. Harris and Mr. Robinson, when he saw two sets of headlights running side by side, realized there was a problem and applied his brakes.

Mr. Bump, the driver of the MTD Products truck, failed to keep a proper lookout to the rear. Just before the truck entered the bridge, Mr. Bump saw the lights of the Dickens automobile dip, looked in his mirror and saw the passing car at his side. He had seen the passing car earlier, when the passing car was South of the four lanes portion of the highway, South of the overpass, traveling fast. He had seen it in the rearview mirror really gaining on his truck prior to reaching the South foot of the overpass. He says as he crested the overpass he saw two cars behind him. He never looked to his rear again until he was entering the bridge.

Mr. Bump was operating the truck too fast for conditions and in excess of the fifty-five miles per hour speed limit. Mr. Bump claims when he first applied his brakes as his rig was entering the bridge, he had his hand on the gear shift, going from ninth gear, which covers forty-five to fifty-six miles per hour, to the tenth, or last, gear. However, the evidence indicates that the speed of the truck was even greater. The speed of the truck before the brakes were applied has been determined by Dr. Thomas Talbot, an accident reconstruction expert, to be at least sixty-five miles per hour. The passing car was finally able

to pass the truck and re-enter the northbound lane, at or near the South end of the bridge.

Mr. Bump failed to have the truck under control. Mr. Dickens, who avoided the collision, stated that Mr. Bump was wrestling with the steering wheel, the trailer was bouncing and swaying, swerving twelve to eighteen inches towards Dickens, about to take flight and he was afraid the truck was going to jack-knife and strike his automobile. It appears that skid marks made by the trailer proceed toward the southbound lane before the point of impact between the tractor and the Harris automobile.

Mr. Harris failed to have his automobile under control. Mr. Harris, on seeing the Dickens automobile nearly stop ahead of him and the truck approaching and going out of control, slammed on his brakes. In slamming on his brakes, his automobile skidded or drifted to the left. The tractor of the truck and the Harris automobile collided to the East of the center line, near the middle of the bridge, according to a gouge mark located by Officer Bobby Reed. The Harris automobile was spun around and driven backwards into the bridge abutment.

Mr. Bump failed to slow or stop the truck safely. The only skid marks of the truck North of the place where the collision with the Harris automobile occurred are front wheel tractor brakes. Mr. Bump should have been able to apply his brakes and stop before the collision with the Robinson automobile, but was unable to do so. It appears that he either did not fully apply the brakes, fearing a jack-knife, or not wearing seat belts, was thrown out of position in the collision with the Harris automobile.

The MTD unit proceeded in the northbound lane for a distance, then crossed into the southbound lane of traffic, occupied by the Robinson automobile and continued to come forward on this side of the road, directly into the path of the Robinson vehicle and struck this automobile headon with great force. It then took the Robinson car with it and struck the bridge abutment, near the North end of the bridge, driving the Robinson automobile back along the guard rail pilings at the North end of the bridge and causing it to catch fire. The truck moved a distance of more than three hundred feet from the place where its brakes were first applied until it struck the Robinson automobile; it moved a distance of more than five hundred feet from the place where its brakes were applied until it finally came to rest.

Mr. Bump was not wearing seat belts and hit his head on the roof, cutting it so that forty stitches were required, in one of the collisions. The trailer brakes were adjusted by another company. Previous repairs for air leaks had been made.

Debra Ann Johnson and Detrick Granberry were seriously injured and Willie Robinson, Jr., Shirley Granberry, Patricia Ann Perkins and Shalanda Granberry were killed in the accident. Witnesses heard groans come from the Robinson automobile.

* * *

b. Defendants MTD and Henry Bump: As to Liability:

On November 2, 1984, at approximately 7:30 p.m., Defendant Henry Bump, an employee of Defendant MTD

Products, Inc., was driving a 1983 Ford Tractor, pulling a 42-foot Monon Trailer northbound on Highway 61 approximately five (5) milers [sic] South of Walls, Mississippi.

As Henry Bump approached the southern end of the flat bridge crossing Lake Cormorant, an unidentified "phantom car" attempted to pass Mr. Bump's tractor-trailer rig in the fact [sic] of an oncoming southbound vehicle owned by Dewey Dickens. Both Dewey Dickens and Henry Bump applied their brakes in an attempt to allow the "phantom car" re-entry into the northbound lane of traffic so as to avoid an accident. The "phantom car" thereafter cut back into the northbound lane of Highway 61 in front of Henry Bump's truck and continued North.

At approximately this same time, a second southbound vehicle owned and operated by Defendant Willis Harris, came upon the rear of the Dickens' vehicle which had slowed due to the "phantom car". In an effort to avoid colliding with the rear of the Dickens' vehicle, Defendant Harris applied his brakes, lost control of his car and veered into the northbound iane of traffic striking the left front wheel of Henry Bump's truck, turning the wheel in a northwesterly direction and disabling the steering gear of the truck.

After Henry Bump's truck passed by the LTD, the truck proceeded out of control into the southbound lane of traffic where it struck a Mercury Montego owned and operated by Willie Robinson.

Defendants MTD and Henry Bump deny that Henry Bump was negligent in any manner and state that this tragic accident resulted from the negligence of the driver of the "phantom car" or from the combined negligence of

the driver of the "phantom car" and the Co-Defendant Willis Harris.

* * *

8. The following facts are established by the pleadings or by stipulation or admission.

* * *

*49. Mr. Bump was not wearing seat belts.

* * *

9. The contested issues of fact are as follows:

1. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the negligence of Bump by (a) failing to keep a proper lookout to the rear; (b) operating his vehicle at an excessive speed under the circumstances then and there existing; (c) failing to maintain proper control; (d) failing to brake properly; (e) failing to yield one half of the roadways.

* * *

4. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the combined negligence of Bump, Harris and the operator of the unidentified vehicle.

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*Relevancy and admissibility are not admitted by MTD or Bump. MTD and Bump reserve the right to explain stipulation No. 49 to the jury. Objection is made on the basis of Rule 403.

5. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the combined negligence of Bump and Harris.

6. Whether the sole proximate cause or a proximate contributing cause of the accident and resulting injuries and death of Plaintiffs Robinson, Perkins, Granberry, Johnson and Granberry was due to the combined negligence of Bump and the operator of the unidentified vehicle.

* * *

8. If Defendant Bump was negligent in any manner (which is denied), then whether the negligence of the operator of the unidentified car and/or the negligence of Willis Harris, or the combined negligence of the operator of the unidentified vehicle and Willis Harris, was an independent superseding cause of the accident and resulting injuries and death of Plaintiffs so as to relieve Defendants MTD and Bump of liability. (Mixed question of law and of fact)

* * *

10. The contested issues of law are as follows:

See mixed questions of law and fact in No. 8 above.

* * *

17. This pretrial order has been formulated at a pretrial conference before the United States Magistrate, notice of which was duly served upon all parties, and at

which the parties attended as hereinabove shown. Reasonable opportunity has been afforded for corrections or additions prior to signing. This order will control the course of the trial, as provided by Rule 16, Federal Rules of Civil Procedure, and it may not be amended except by consent of the parties and the court, or by order of the court to prevent manifest injustice.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX OF THE ESTATE OF WILLIE ROBINSON, JR., ET AL
Plaintiffs
v.
HENRY M. BUMP and MTD PRODUCTS, INC., and WILLIS C. HARRIS

CIVIL ACTION NOS.
DC 84-221, -224, -227, -228
-231-D-O

[EXCERPTS FROM PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTIONS IN LIMINE]
(Filed Feb 1, 1988)

COMES NOW the Plaintiffs by and through counsel and makes the following responses to the Defendants Henry M. Bump and MTD's Motion In Limine. Plaintiffs respond as follows:

* * *

MR. BUMP'S FAILURE TO USE SEAT BELTS

1. The issue of seat belts is important concerning the issue of Henry M. Bump's control. It is clearly relevant under Federal Rule of Evidence 401. In the recent case of *Stong vs. Freeman Truck Line, Inc.*, 456 So.2d 698 (Miss. 1984), the Mississippi Supreme Court has held that Federal Highway Administration Regulations which apply to trucks moving in interstate commerce furnish the reasonable man standard for all persons who come within their scope. Title 49 of the Code of Federal Regulations at §392.16 provides: "A motor vehicle which has a

seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself with the seat belt assembly." This regulation is a safety regulation of the Federal Highway Administration. It is undisputed that Henry M. Bump was driving the 18 wheel tractor/trailer in interstate commerce. Thus these Federal Highway Administration Regulations clearly apply to him, preempt state law, and in accordance with the above cited Mississippi decision furnish the standard of care to which he must adhere.

2. As noted above, the issue of the seat belt is relevant to Mr. Bump's control of the vehicle. As also noted above, there is a Federal Highway Administration Regulation which mandates the use of seat belts. Violation of this regulation by Henry M. Bump and his employer's policy concerning seat belts is relevant in that the Defendants claim that failure to wear seat belts does not establish negligence in this case.

* * *

[EXCERPTS FROM TRIAL TRANSCRIPT]

[269] * * *

MR. THOMPSON: [. . .] Your Honor, may we approach the bench, please? May counsel approach the bench?

THE COURT: Yes.

(At the bench.)

MR. THOMPSON: What we want to do here, Your Honor, and I decided to stop at this point, because I'm going to ask him about the equipment on his vehicle, and I wanted to ask him about this, mirrors, fuzz-busters, the seat belts, and whether it was installed, and then later on in his testimony ask him to say if — questions about whether he was thrown out and that sort of thing. I'm sure the matter of the governor will probably come up in this conversation also, Your Honor.

MR. DUNBAR: A lot of points to cover, Your Honor. Maybe we ought to take a recess and discuss that, because we'd like to be heard on it, too.

THE COURT: Don't you think probably the thing to do would be to take a proffer out of the jury's presence and let [270] me hear what the —

MR. DUNBAR: All right, sir. However you'd like to do it.

THE COURT: Well, we know he's going to testify that he has the fuzz-buster, the seat belts —

MR. THOMPSON: Mirrors.

THE COURT: — mirrors.

MR. BOSTICK: And a CB.

MR. THOMPSON: And a CB, for whatever that's worth. Lots of different equipment.

MR. DUNBAR: It's a matter for argument, Your Honor, as well as the fact — correct me if I'm wrong — I don't think these are issues in the pretrial order.

MR. THOMPSON: Well, it's certainly no surprise to anybody.

MR. DUNBAR: No.

MR. THOMPSON: You objected to the introduction of the fuzz-buster as a matter of not being relevant under the Rule 401. Objected to the use of the seat belts, too. I really don't —

THE COURT: All right. I tell you what, we may be able to — really, it appears to the Court that the evidence, the existence of the evidence, is pretty much stipulated to. It's just primarily argument whether or not it's relevant and admissible.

[271] MR. DUNBAR: That's really why I didn't think the proffer would be helpful.

THE COURT: Yes. Let's just let me excuse this jury.

MR. THOMPSON: Yes, sir.

(In open court.)

THE COURT: Ladies and gentlemen of the jury, as I told you at the outset, there will be times when the Court will have to take up certain matters out of your

presence. We have come to one of those junctures in the trial. I will at this time excuse the jury, ask that you go to the jury room, do not leave the jury room, and let the Court address certain matters out of your presence. Hopefully this will be momentarily and won't take that long a time.

(Jury out.)

THE COURT: Mr. Thompson, the Court —

MR. THOMPSON: Yes, sir.

THE COURT: — understands that at this point you are going into the matter of the equipment that was on the truck and tractor at the time, that there are certain objections made as to the relevancy of some of these items, and I will hear you at this time, please, sir.

MR. THOMPSON: Your Honor, if it please the Court, I have asked my associate, Walker Sims, to brief that. Do you have any problem with hearing his argument on that, sir?

THE COURT: No, sir.

[272] MR. SIMS: Do you have any special order that you'd like me to address the issues in?

THE COURT: No, sir. Let's just do it as expediently as you can.

MR. SIMS: Yes, sir.

The first issue I'd like to address is the issue of the relevance of the seat belts, and the point that we make on the relevance of the seat belts is that we have stated in the pretrial order that Mr. Bump may have been thrown from

his seat at the Harris collision, and that it's relevant as to his control following the Harris collision, whether he was in the seat or not, and that his wearing seat belts would have a bearing on the ability for him to be able to be thrown from his seat.

And we believe that the federal regulations governing truck drivers like Mr. Bump require that one wear seat belts and — could I approach the bench and give you copies of the regulations?

THE COURT: No, sir. I have it in my hand here. 49 CFR 392.16.

MR. SIMS: Yes, Your Honor.

THE COURT: Yes, sir.

MR. SIMS: And we believe that this federal law preempts any state law and furnishes the rule as to what a reasonable man should do in the circumstances of driving a truck, [273] and that we are entitled to have — we are entitled to show that Mr. Bump was not driving with his seat belt on and that he may well have been thrown out of his seat at the Harris collision, and that would be relevant on his negligence in not being buckled in and being thrown away from the wheel where he could not control the vehicle any longer.

THE COURT: Now, Mr. Dunbar, do you think it would expedite matters if we address each one of these issues separately?

MR. DUNBAR: However you'd like to do it, Your Honor.

THE COURT: Well, it might — I'll tell you, Mr. Dunbar, Mr. Thompson, Mr. Sims, the Court of course recognizes that the ICC regulations, the federal highway regulations, are appropriate to come before a jury if they are relevant to the case. Now, of course, you've got the case, the *Freeman Truck Line* case in Mississippi, and any number of cases where federal regulations concerning speed, the conduct of a truck driver in a foggy situation, or where there's ice on the road, and any number of things, but the Court here is confronted with a situation where speed and lack of control are the primary contentions or allegations on the part of the plaintiff against this defendant.

Now, the testimony that's before the Court at this point is to the effect that as the Bump truck met the Dickens vehicle on that bridge that Mr. Bump was wrestling with the [274] steering wheel, that he was in position to steer the vehicle, and also the testimony according to Mr. Dickens was to the effect that he was braking, that he had been braking the truck.

Now, my question is, how is it relevant in this case? How would it have changed things or made things different as to whether or not he was wearing a seat belt?

MR. SIMS: May I address that, Your Honor?

THE COURT: Yes, sir.

MR. SIMS: Mr. Bump has testified by deposition that he was thrown out of the seat in the second collision, the collision with the Robinson car; however, we intend to introduce testimony through Officer Bobby

Reed that Mr. Bump told Mr. Reed on a couple of occasions that he was thrown out of the seat on the first collision with the Harris car.

THE COURT: All right. That he was —

MR. SIMS: And that he was — and it's relevant on the issue of his being able to control the car after the Harris collision.

THE COURT: It's your position that the collision with the Harris car threw him from his seat, or from his position behind the steering wheel, and that that affected his ability to maintain control in the interim between the Harris collision and the Robinson collision?

MR. SIMS: We believe that there's evidence to [275] support that, yes, Your Honor.

THE COURT: Mr. Dunbar, I will hear from you on this seat belt issue.

MR. DUNBAR: Yes, sir. There are several objections, several reasons why we feel it's not admissible, Your Honor, besides the relevance concerns that you have. Number two, this is not an issue of fact or law, as I understand the pretrial order. But, thirdly, a person, in order to take advantage of the statute and claim that it's actionable, the statute or rule or regulation has to be enacted to benefit that class of persons, Your Honor.

A seat belt regulation is purely obviously for the benefit of the occupant of a vehicle. It's not designed to protect the public at large. It's not a regulation or statute, Your Honor, therefore, that strangers to the regulation can invoke as a regulation enacted for their benefit. That's the third reason we think it's not admissible.

Just one second.

(Mr. Dunbar and Mr. Henke conferred off the record.)

MR. DUNBAR: I don't believe in the pretrial order there's any issue of law or mixed law and fact. I don't think this is addressed at all as being bases of a cause of action, either.

MR. SIMS: Your Honor? Can I address that?

THE COURT: Yes, sir.

[276] MR. SIMS: In our statement of facts on page 5 of the final pretrial order, it says, "It appears that he either" — and this is at the middle of the page, third paragraph.

THE COURT: Wait just a minute. Page —

MR. SIMS: Page 5 of the pretrial order, Your Honor, third paragraph, and the last sentence.

THE COURT: All right.

MR. SIMS: "It appears that he either did not fully apply the brakes, fearing a jackknife, or not wearing seat belts, was thrown out of position in the collision with the Harris automobile."

THE COURT: Those are contentions of the plaintiffs. Now, let's turn over to, what is it, page 13?

"The contested issues of fact are as follows:"

MR. THOMPSON: Let me give this to you.

(Mr. Thompson and Mr. Sims conferred off the record.)

THE COURT: You say that the issue of failure to maintain proper control includes this failure to wear a seat belt?

MR. SIMS: Yes, Your Honor, that's our contention. It was one of the contested issues of fact whether Bump's negligence was the failure to keep a proper lookout to the rear, operating at excessive speed, failing to maintain proper control, or failure to maintain, or failure to brake [277] properly could be under both proper control and failure to brake properly.

THE COURT: Well, gentlemen, the fact that Mr. Bump's truck was equipped with seat belts and the fact that he was not wearing the seat belts on the occasion in question has been stipulated to.

MR. DUNBAR: That's right.

MR. HENKE: That's correct.

THE COURT: So, the Court is of the opinion that at this point in this trial, based on the evidence that is before this Court at this time, that there is no showing that the failure to wear a seat belt in any way contributed to Mr. Bump's failure to maintain his truck under proper control.

There's been no proof before the Court at this time as to anything that occurred after Mr. Dickens met and passed the Bump vehicle on the highway. Now, the Court accordingly rules that the seat belt issue is not relevant as to the defendant Bump's failure to maintain proper speed, proper lookout, and proper control at this point.

It may very well develop with other witnesses that it would become relevant.

MR. THOMPSON: Your Honor, may I say one thing?

THE COURT: Yes, sir.

MR. THOMPSON: That the expert witnesses in this case for the defendant, Drs. Arnold and Bass, have testified [278] by way of deposition two important things: One is after the collision between the MTD vehicle and the LTD Harris vehicle that there was no braking, no evidence of braking to the collision point with the Robinson vehicle.

THE COURT: Well —

MR. THOMPSON: Yes, Your Honor.

THE COURT: — won't those depositions ever come before this Court and jury?

MR. THOMPSON: Yes, sir, but I don't know if it would be too late at that point to ask the very man who we think maybe didn't have on his seat belts where he could not brake that vehicle from the LTD to the Robinson. They will also testify, they being the expert witnesses, that the steering mechanism from their inspection of the MTD vehicle was all still intact, metal to metal, from the steering wheel down through the steering mechanism to the tie rods to both wheels. And their allegations in that case that the steering mechanism was disabled or impaired is no longer in existence.

THE COURT: What does that have to do with a seat belt?

MR. THOMPSON: We want to know whether he was at the wheel with his hands on the wheel or

whether it could be true that he told Bobby Reed that he had gotten knocked off and was sitting over in the other seat.

[279] THE COURT: Well, you've got him on cross-examination here. You can ask him.

MR. THOMPSON: May I ask him that?

THE COURT: Just stay away from the seat belt. You can ask him anything about braking, steering, or proper control or anything else. The Court rules at this time that the federal regulation is not relevant to the issues in this case at this point. All right? Let's go to the next point.

* * *

No. 89-1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX OF THE ESTATE OF WILLIE ROBINSON, JR., AND THE REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF WILLIE ROBINSON, JR.; COMMILLA PERKINS AS REPRESENTATIVE OF THE HEIRS AT LAW OF PATRICIA ANN PERKINS, DECEASED, DEBRA ANN JOHNSON, A MINOR BY AND THROUGH JOHNNIE MAE JOHNSON, HER MOTHER AND NEXT FRIEND; AND DETRICK GRANBERRY, A MINOR BY HIS FATHER AND NEXT FRIEND, ALONZO GRANBERRY, AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF SHALANDA GRANBERRY,

Petitioners,

v.

MTD PRODUCTS, INC., and HENRY M. BUMP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONERS' REPLY BRIEF

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IN THE

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OCTOBER TERM, 1990

No. 89-1996

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX OF THE ESTATE OF WILLIE ROBINSON, JR., AND THE REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF WILLIE ROBINSON, JR.; COMMILLA PERKINS AS REPRESENTATIVE OF THE HEIRS AT LAW OF PATRICIA ANN PERKINS, DECEASED, DEBRA ANN JOHNSON, A MINOR BY AND THROUGH JOHNNIE MAE JOHNSON, HER MOTHER AND NEXT FRIEND; AND DETRICK GRANBERRY, A MINOR BY HIS FATHER AND NEXT FRIEND, ALONZO GRANBERRY, AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF SHALANDA GRANBERRY,

Petitioners,

v.

MTD PRODUCTS, INC., and HENRY M. BUMP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY BRIEF

STATEMENT OF THE CASE

Respondents deny that there is a conflict in the circuits whether a pre-trial order should be narrowly construed when the issue is inherent in the language of the order

and no surprise to opposing counsel. However, respondents fail to discuss or analyze the conflicting standards of interpretation pursuant to Rule 16 of the Federal Rules of Civil Procedure in the cases raised by the petitioners. Furthermore, they do not comment on the assertions of Professors Moore and Wright that there is a split in the circuits on this issue. In fact, the respondents *never* state what type of standard should be used in the interpretation of pre-trial orders. Petitioners submit that respondents have not addressed the issue raised concerning the construction of pre-trial orders.

Also, there is one glaring factual inaccuracy in the respondents' statement of the case. Respondents claim that they were unaware that petitioners would seek a negligence *per se* instruction when they received the petitioners' response to their motion in limine to exclude evidence that the truck driver was not wearing his seat belt. Two negligence *per se* instructions along with petitioners' other instructions had been sent to the Court and opposite counsel in advance of the February 1, 1988 trial. (Tr. 11) The response to the motion in limine was filed on February 1, 1988. (R. 597) Respondents' assertions throughout their statement of the case that they were unaware of a negligence *per se* theory during trial are simply without the slightest shred of foundation.

The respondents also give an inaccurate impression in their version of the way the accident occurred. The respondents leave the inference that the white car made the entire pass of Mr. Bump's truck on a bridge on a two-lane highway. The uncontradicted testimony at trial was that the small white car began its attempt to pass at a point at least 300 feet from the bridge. (T. 1207 and Exhibit P-3) There was also other testimony that placed the distance much further back. (T. 214-217) This correction gives a clearer perspective of the events involved.

The Fifth Circuit has adopted a rule of narrowly construing pre-trial orders pursuant to Rule 16. This rule

is in direct conflict with the rules adopted by the First, Sixth, and Tenth Circuit Courts of Appeals which require a broad and liberal construction of pre-trial orders. Petitioners urge the Court to grant certiorari and follow the broad construction rule supported by a majority of the circuits and the treatise writers.

I. THERE IS A CONFLICT IN THE CIRCUITS CONCERNING WHETHER A PRE-TRIAL ORDER SHOULD BE NARROWLY CONSTRUED TO PRECLUDE ISSUES WHICH ARE INHERENT IN THE LANGUAGE OF THE ORDER AND NO SURPRISE TO OPPOSING COUNSEL OR SHOULD BE BROADLY CONSTRUED TO INCLUDE SUCH ISSUES.

In the case at bar, there can be little argument that the pre-trial order served its purpose by alerting counsel opposite that the failure to wear a seat belt was an issue in the litigation. It was admitted to be no surprise. (App. to Pet. for Cert. 43). Petitioners clearly laid out in the "Concise Summary of the Plaintiffs' Ultimate Facts" that Mr. Bump may have been thrown out of his seat because he was not wearing a seat belt. (App. to Pet. for Cert. 50). Further, the failure to wear his seat belt was the subject of an admission which was qualified by the respondents with a reservation to explain the stipulation to the jury. (R. 375)

Respondents even filed a motion in limine which stated that there was no duty for the respondent, Mr. Bump, to wear a seat belt. (App. to Pet. for Cert. 53) It is now plainly obvious that 49 C.F.R. § 392.16 (1984) does require a truck driver to wear his seat belt and is designed to protect other users of the highway. The seat belt insures the driver will remain in this seat during evasive maneuvers in crash situations.

The respondents deny that there is any conflict in the circuits on the interpretation of pre-trial orders. There is an unavoidable difference between the standards set by

the Fifth Circuit and those of the First, Sixth, and Tenth Circuits. This split is noted by Professor Moore in his treatise on civil procedure. Professor Moore supports the broad construction of pre-trial orders and states as follows:

> When interpretation of a pretrial order is necessary, the court should not follow an inflexible approach; pretrial orders should be liberally construed. There is, however, contrary authority.

3. J. Moore, Moore's Federal Practice ¶ 16.19, pp. 16-77, through 16-78 (2 ed. 1989).

Professor Moore cites the Fifth Circuit case of *Flannery v. Carroll*, 678 F.2d 125 (5th Cir. 1982) as the contrary authority. In the *Flannery* case, the Fifth Circuit set forth the following rule on the construction of pre-trial orders:

> District Courts are encouraged to construe Pretrial Orders narrowly, without fear of reversal. *Hodges*, 597 F.2 at 1014.

Flannery v. Carroll, 676 F.2d 126 (5th Cir. 1982).

On the other hand, the Tenth Circuit has adopted a rule requiring a broad construction of pre-trial orders. The case of *Century Refining Company v. Hall*, 316 F.2d 15 (10th Cir. 1963), states the broad construction rule and its rationale:

> But, while the Pre-trial Order should measure the dimensions of a lawsuit and govern its course in the absence of some good reason for departure, this does not mean that the Order should not be liberally construed to embrace all of the legal and factual theories inherent in the issues defined therein. Any other construction of the Pre-trial Order would tend to unduly constrict the trial of the case and defeat the central and salutary purpose of the Federal Rules of Civil Procedure to insure the trial of every lawsuit on its merits. It is a procedural tool to facilitate the trial of the lawsuit on its merits and not to

> defeat it on a technicality. We must not allow ourselves to construe the Pre-trial Order in the spirit of a common law pleading.

Id. at 19-20.

In the case at bar, the petitioners carefully identified the issues for trial pursuant to Rule 16. It is *extremely important* to note that in course of the trial there was no comment by respondents' counsel that they were surprised by the issue of the seat belt. In fact, counsel for respondents admitted it was no surprise. (App. to Pet. for Cert. 43-44). The numerous cases cited by respondents all involved some allegation of surprise or a failure to alert the court to an issue. The seat belt issue is inherent in the factual allegations and admissions in the pre-trial order. Under the broad construction rule, the issue is certainly preserved.

Petitioners urge this Court to grant certiorari in order to settle the conflict in the circuits. The Fifth Circuit has adhered to a rule of narrow construction which is simply out of step with the policy of the Federal Rules of Civil Procedure. This Court should adopt the broad construction rule supported by the majority of the circuits and the treatise writers.

II. THE INTERPRETATION OF THE SEAT BELT REGULATION IN LIGHT OF ITS REGULATORY HISTORY IS PROPER AND AN ISSUE OF NATIONAL IMPORTANCE.

The Petitioners requested two instructions concerning 49 C.F.R. § 392.16 which requires a truck driver to wear a seat belt. (App. 1a-3a). Petitioners vigorously argued at trial that the regulation protected other users of the highway by keeping the driver in his seat even after a collision. (App. 4a-5a). The Court refused to grant either instruction. (App. 1a-3a). Respondents cite no authority for their proposition that petitioners are barred from raising the regulatory history.

The petitioners requested proper instructions and the Court simply misinterpreted the purpose of the regulation. The regulatory history is informative and was obviously not in the possession of either side at trial. The history demonstrates beyond any serious argument that the regulation was designed to protect other users of the highway by aiding the truck driver's ability to take evasive maneuvers in crash situations. The people in the Robinson car who were injured and killed in the crash were surely part of the protected class.

The interpretation of 49 C.F.R. § 392.16 is of national importance. A decision by this Court that the regulation was designed to protect other users of the highway would benefit all the driving public and provide a meaningful penalty for non-compliance.

CONCLUSION

Petitioners request that this Court grant certiorari in order to rule on the split in the circuits concerning the interpretation of pre-trial orders under Rule 16 of the Federal Rules of Civil Procedure. The split in the circuits is recognized by the treatise writers, and the Court would provide needed guidance to the district courts in their interpretation of pre-trial orders by deciding this case. Petitioners would submit that the Court should adopt the broad rule of construction adhered to by the First, Sixth, and Tenth Circuit Courts of Appeals. This rule follows the purpose and spirit of the Federal Rules of Civil Procedure and is supported by the treatise writers and a majority of the circuits.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI, DELTA DIVISION

Civil Action Nos. DC 84-221, -224, -227, -228, -231-D-O

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX
OF THE ESTATE OF WILLIE ROBINSON, JR., *et al.*,
Plaintiffs

v.

HENRY M. BUMP and MTD PRODUCTS, INC.,
and WILLIS C. HARRIS,
Defendants

[Refused by Court February 17, 1988; R. 636]

INSTRUCTION NO. P. 13

You are instructed that it was a violation of the Federal Highway Administration regulations for Defendant Henry M. Bump to have failed to restrain himself with his seatbelt at the time of this accident. You are further instructed that such conduct and violation of the regulation constitutes negligence as a matter of law. If you further find from a preponderance of the evidence that the Defendant Henry M. Bump's failure to comply with this regulation was the sole proximate cause or proximate contributing cause of the deaths and injuries of the Plaintiffs, then it is your sworn duty to return verdict in favor of the Plaintiffs against the Defendant Henry M. Bump and MTD Products, Inc. and assess money damages in accordance with the other instructions of this Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI, DELTA DIVISION

Civil Action Nos. DC 84-221, -224, -227, -228, -231-D-O

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX
OF THE ESTATE OF WILLIE ROBINSON, JR., *et al.*,
Plaintiffs

v.

HENRY M. BUMP and MTD PRODUCTS, INC.,
and WILLIS C. HARRIS,
Defendants

[Refused by Court February 17, 1988; R. 635]

INSTRUCTION NO. P. 14

You are instructed that a Federal Highway Administration Regulation found in Volume 49 of the Code of Federal Regulations at Section 392.16 provides: "A motor vehicle which has a seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself with the seat belt assembly." You are instructed that it was a violation of this regulation for Defendant Henry M. Bump to have failed to restrain himself with his seat belt at the time of this accident. You are further instructed that such conduct and violation of the regulation constitute negligence as a matter of law. If you further find from a preponderance of the evidence that Defendant Henry M. Bump's failure

to comply with this regulation was the sole proximate cause or a proximate contributing cause of the deaths and injuries of the Plaintiffs, then it is your sworn duty to return a verdict in favor of the Plaintiffs against the Defendant Henry M. Bump and MTD Products, Inc. and assess money damages in accordance with the other instructions of this Court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

Case Numbers DC84-22-D-O, DC84-224-D-O,
DC84-227-D-O, DC84-228-D-O, DC84-231-D-O

ROBINSON, *et al.*,
Plaintiffs-Appellants

v.

BUMP, *et al.*,
Defendants-Appellees

EXCERPT FROM TRIAL TRANSCRIPT

(February 3, 1988)

* * * *

[558] THE COURT: Now, let me ask the plaintiff, do you gentlemen have any authority? I'd like to hear your authority. I'd like to hear from you.

[559] MR. SIMS: We have cases that don't deal with this specific regulation, but which deal with other highway regulations, such as where a—when a—there are highway safety regulations in the same code section which state exactly where a truck should pull off the road and—

THE COURT: What's the style of one of your cases?

MR. SIMS: Well, the *Strong* versus ——

THE COURT: *Freeman Truck Lines?*

MR. SIMS: Yes, Your Honor.

THE COURT: Yes, all right.

MR. SIMS: And the Mississippi Supreme Court recognized in that case that the federal law did preempt our

state law, and not only did it preempt it, it said that it furnished the standard of care which the driver would be held to, and it effectively legislated what a reasonable person must do in those situations.

THE COURT: That case, as I recall, involved the parking on an interstate highway?

MR. SIMS: Yes, Your Honor.

THE COURT: And the number of flares and flags, and so forth, that should be put to the rear of the truck?

MR. SIMS: Yes, Your Honor.

THE COURT: Well, there's no question that all of the CFR's pertaining to speed and lighting in fog pertain to [560] the operation of the vehicle to protect the public, the traveling public. And, of course, that Freeman Truck Line case, you put flares out behind your parked vehicle to protect the people coming behind you. Do you have any authority concerning seat belts?

MR. SIMS: There's been no reported decision on the seat belt issue and we have run it through all the computers. But I would say that the section you just mentioned concerning hazardous conditions is just two sections back from the seat belt section, and I think that you have to construe these statutes together, and I think the fact that the seat belt statute is 392.16, the care that you are supposed to use under hazardous conditions is 392.14, and I think it's clear that your wearing your seat belt is not only a safety protection to you, it's a safety protection from you getting knocked out of your seat and not being able to control your vehicle, which is exactly why we're trying to introduce it into evidence here.